

IN THE  
MISSOURI SUPREME COURT

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MARCELLUS WILLIAMS,	)	
	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC 86095
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

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APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI  
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 11  
THE HONORABLE EMMETT O'BRIEN, JUDGE

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APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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## **JURISDICTIONAL STATEMENT**

Appellant, Marcellus Williams, was jury tried in the Circuit Court of St. Louis County and convicted of first degree murder, §565.020 RSMo 2000,<sup>1</sup> first degree burglary, §569.160, first degree robbery, §569.020, and two counts of armed criminal action, §571.015.1 (D.L.F.501,503,506,509,511).<sup>2</sup> The court sentenced Mr. Williams to death, life on the robbery, and thirty years on each of the remaining counts, to be served consecutively (D.L.F.573-74). This Court affirmed in *State v. Williams*, 97 S.W.3d 462 (Mo.banc2003).

Mr. Williams filed his *pro se* motion for post-conviction relief under Rule 29.15 (L.F.6-32) which appointed counsel amended (L.F.69-295). The motion court denied a hearing on all the claims, except Mr. Williams' right to testify in penalty phase (L.F.366) and denied relief (L.F.776-815). Mr. Williams now appeals. Because a death sentence was imposed, this Court has exclusive appellate jurisdiction. Art. V, §3, Mo. Const. (as amended 1982).

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<sup>1</sup> All statutory references are to RSMo 2000, unless otherwise indicated.

<sup>2</sup> Record citations are as follows: evidentiary hearing transcript (H.Tr.); legal file of 29.15 appeal (L.F.); trial transcript (Tr.); direct appeal legal file (D.L.F.); and exhibits (Ex.). Mr. Williams requests that this Court take judicial notice of its files in *State v. Williams*, S.Ct. No. 83934. Judge O'Brien considered the trial transcript and legal file in ruling on Mr. Williams' claims (H.Tr.42-43).

## **STATEMENT OF FACTS**

On August 11, 1998, Felicia Gayle was killed in her home in University City, suffering multiple stab wounds(Tr.1712,2163). She had worked for the St. Louis Post Dispatch years earlier, so the crime received a substantial amount of pretrial publicity(Tr.1730,2820-28). Months went by without any charges. On January 6, 2000, the State charged appellant, Marcellus Williams, with first degree murder, burglary, robbery, and two counts of armed criminal action(D.L.F.17-20). Two witnesses had come forward: Henry Cole, an inmate who was seeking the \$10,000.00 reward for information leading to arrest and conviction, and Laura Asaro, Mr. Williams' girlfriend at the time of the alleged offense(D.L.F.38, Tr.1909-14,2421,2445,2454-59).

Initially, State did not provide Cole and Asaro's addresses or reveal how to locate them(D.L.F.38,61,137). The State filed motions to preserve both witnesses testimony, saying that the prosecution and police were not in regular contact with the witnesses(D.L.F.40-41,43-44). On March 13, 2001, the State provided notice of Asaro and Cole's addresses(D.L.F.151).

Defense counsel filed motions for disclosure of exculpatory evidence. They requested disclosure of informant material, including Cole and Asaro's criminal records, prior statements, benefits received, agreements with the State, other cases where they had been informants, and prior untruthful and misleading information they provided(D.L.F.188-92). Counsel filed a motion requesting disclosure of any exculpatory evidence(D.L.F.266-68). They asked for arrest and

conviction reports of the State's witnesses(D.L.F.269-70). They requested production of favorable evidence, including criminal records of state witnesses (D.L.F.287-88). They asked that the State reveal any agreements entered into with State witnesses(D.L.F.289-91). The Court granted the motion for production of favorable evidence(D.L.F.386).

Less than a month before trial, counsel requested a continuance(D.L.F.394-98). The defense complained about late and nondisclosure from the State. *Id.* Counsel had not obtained Mr. Williams' Department of Corrections records(D.L.F.395). They needed to investigate Cole, he had twelve prior convictions, but the defense had received none of the records (D.L.F.395). Cole refused to sign releases for information(D.L.F.395). The State had not disclosed Cole's and Asaro's correspondence with police, remuneration by the police, or writings and drawings Cole made for police(D.L.F.396). Counsel needed to do scientific testing, but had just obtained raw data from the State (D.L.F.396). Counsel could not adequately prepare and provide effective assistance because he was scheduled for trial in another death penalty case, Kenneth Baumruk, on May 7, 2001(D.L.F.397). The court denied the continuance (D.L.F.400).

On May 25, 2001, counsel filed a supplemental motion for continuance (D.L.F.457-61). The State just disclosed a statement allegedly made by Mr. Williams to another inmate, a prior unadjudicated burglary Mr. Williams committed in Kansas City, reports showing scene fingerprints had been destroyed, and a written reward agreement between University City and the victim's



family(D.L.F.458). The Department of Corrections could not locate Mr. Williams' records(D.L.F.458-9). Counsel wanted to obtain forensic testing on the physical evidence to show others had committed the crime(D.L.F.459,Tr.127-28). Again, the court denied the continuance(D.L.F.462).

Defense counsel renewed the motions for continuance during trial because counsel did not have Cole's state hospital records or his medical history(Tr.1630-31). The request was denied(Tr.1631).

Before trial, the State filed motions in limine to preclude the defense from admitting evidence that someone else committed the crime, specifically, evidence of Deborah McLain's<sup>3</sup> murder(D.L.F.401-03,416-17). The State wanted to prevent impeachment of Cole with his prior arrests for murder and other crimes(D.L.F.404-05). The State sought to limit any reference to Cole's admissions to psychiatric hospitals or treatment by psychiatrists or psychologists(D.L.F.405). Later, the prosecutor added Asaro's psychiatric and psychological history as evidence that should be excluded(D.L.F.442). The State did not believe any prior bad acts of state witnesses were admissible(D.L.F.442).

Mr. Williams filed a *pro se* motion for actual conflict of interest (D.L.F.444-45) but the Court held no hearing on this motion (Tr.).

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<sup>3</sup> The McClain murder had occurred near the time of Gayle's murder and investigators noted similarities (H.Tr.27-28).

On June 1, 2001 the Friday before trial, the State provided Asaro and Cole's arrest and conviction records(D.L.F.471).

Trial began on Monday, June 4, 2001(Tr.136). After selecting the jury, the prosecutor argued that the defense should not be allowed to present evidence that others committed the crime(Tr.1614-15). Calvin Shaw had provided the defense with an affidavit indicating that Asaro admitted that one of her prostitution customers committed the murder and gave her the laptop computer to sell (Tr.1616-17,1619-20). However, the prosecutor's investigator interviewed Shaw and he recanted his entire statement to the defense(Tr.1616). Shaw now said Mr. Williams confessed in great detail to the murder(Tr. 1617). Shaw told the State this information either June 7 or June 8, 2001(Tr.1617,1619).<sup>4</sup> The defense agreed not to mention Shaw or his proposed statement(Tr.1629).

At trial, the State called Asaro(Tr.1839-1993) and Cole(Tr.2379-2454) to establish Mr. Williams' guilt.<sup>5</sup> Asaro and Cole both claimed that Mr. Williams had confessed to the murder of Gayle(Tr.1848,1850-51,2390-2403,2410-13). The State established that in August, 1998, Mr. Williams gave a neighbor, Glenn

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<sup>4</sup> Initially, the prosecutor said his investigator interviewed Shaw a day earlier and then changed the time to "today at lunch"(Tr.1617-19).

<sup>5</sup> For a complete summary of the State's evidence viewed in the light most favorable to the verdict, see *State v. Williams*, 97 S.W.3d 462, 466-67 (Mo.banc2003).

Roberts, the victim's husband's computer, in exchange for \$150-\$250(Tr.2000-2027).

The State introduced evidence that while Mr. Williams awaited trial, he attempted to escape from jail and assaulted a guard, hitting him in the head with a metal pipe(Tr. 2617-2637,2673-97). The jury was not given a limiting instruction on how to consider this evidence(D.L.F.479-99).

Throughout trial, the defense complained about the State's nondisclosure. The State had not disclosed a letter from John Duncan to the prosecutor's investigator containing statements made by Mr. Williams(Tr.1790-95). When Cole testified, the lead prosecutor, Keith Lerner, revealed for the first time that Mr. Williams supposedly told Cole that the victim was a "whitey"(Tr.2450-53). Lerner had not disclosed evidence that two nights before Asaro testified, someone threatened her with a gun and told her she better not go to court(Tr.1874-80). Similarly, counsel never received notice of threats made against Cole (Tr.2557-58). Lerner never produced a note allegedly written by Mr. Williams with Laura Asaro's name, address, and phone number that he gave to Cole, who provided it to police(Tr.2564,2589,2600-2610). Finally, Lerner never disclosed a statement allegedly made by Mr. Williams to inmate, Mathieu Hose, that Mr. Williams had the idea to kill a guard(Tr.2619-21).

The defense tried to discredit Cole and Asaro impeaching both witnesses with their prior convictions, desire for the reward, and prior inconsistent statements(Tr.2454-2556,1921-1956). However, the Court would not allow

counsel to impeach Asaro regarding her arrests occurring prior to the charged offense(Tr.1941-42) or Cole regarding his arrests in 1999 for disorderly conduct and public intoxication(Tr.2538-43).

The defense established that no physical evidence at the victim's home linked Mr. Williams to the crime(Tr.2858-2887,2949-2965). The jury deliberated more than five hours, and convicted Mr. Williams on all five counts(Tr.3069, 3072-74).

At the penalty phase, the State presented evidence of Mr. Williams' prior criminal conduct (both convictions and unadjudicated bad acts)(Tr.3107-3117,3122-29,3130,3132-36,3143-59,3167,3168-71,3184-87,3188-92,3193-97) and victim impact evidence(Tr.3201-3284).

The defense called defendant's family to establish that he was loving and caring, especially to his children(Tr.3301-3444-45). The defense wanted to present an expert, Dr. Cunningham to testify about the psychological impact Mr. Williams' execution would have on his children(Tr.3385-93,3447-52). The Court ruled that this impact evidence was inadmissible(Tr.3395,3453).

The jury deliberated less than two hours and assessed punishment at death (Tr.3517-18).

On appeal, counsel raised ten claims; five alleged plain error(App.Br). Counsel did not raise the trial court's denial of defense counsel's request for a continuance or the exclusion of mitigating evidence of the impact of an execution

on the defendant's family. *Id.* This Court affirmed the convictions and sentences. *State v. Williams*, 97 S.W.3d 462 (Mo.banc2003).

Mr. Williams filed a *pro se* Rule 29.15 motion, raising claims of prosecutorial misconduct and ineffective assistance of counsel(L.F.6-32). The court appointed counsel(L.F.36-37). Counsel requested discovery including Asaro's drug treatment records, Cole and Asaro's mental health records and correction records, police reports of the McClain homicide, and police reports of all the police searches of Mr. Williams' car(L.F.42-48,49-55). The motion court required the State to provide a list of Cole's prior convictions contained in the trial transcript (Tr.2379-84), but denied all other discovery(L.F.66-68,390,403,750-55).

Counsel filed an amended motion that did not include many claims included in Mr. Williams' *pro se* motion(L.F.69-353). Mr. Williams filed a *pro se* motion to reject appointed counsel under Rule 29.16(L.F.356-57). The court asked for a response from counsel, and later denied the motion, making no findings about Mr. Williams' competency to reject counsel or his understanding of the consequences of rejecting counsel(L.F.366,774-75).

The motion court denied all Mr. Williams' claims without a hearing, except the allegation that trial counsel was ineffective for failing to allow Mr. Williams to testify in penalty phase(L.F.483). The court heard Mr. Williams' testimony by deposition(L.F.598-746), and held an evidentiary hearing in which the two trial attorneys testified(H.Tr.43-141) Neither trial attorney could remember advising

Mr. Williams about his right to testify in penalty phase(H.Tr.46,53-54,66,67-68,83,94,102,111,116,120-22,126,131).

Mr. Williams testified that he did not know he had a right to testify in penalty phase(L.F.598). His attorneys never discussed this right with him(L.F.598). Had he known, he would have testified(L.F.599,603). In mid-August, 1998, Asaro got off a bus with a laptop computer(L.F.669-70). She told Mr. Williams that she got the computer from one of her prostitution customers (L.F.671). She wanted to sell the computer, so Mr. Williams gave her his brother's pager number and asked people in the neighborhood if they were interested(L.F.671-72). Glen Roberts gave \$150.00 for the computer(L.F.672-73). Mr. Williams maintained his innocence, but his heart still went out to Felicia Gayle and her family(L.F.679). He was deeply sorry for their loss(L.F.679).

The motion court entered findings of fact and conclusions of law, denying all Mr.Williams' claims(L.F.776-815). This appeal follows.

## **Introduction**

This case presents a recurring issue arising from death penalty cases tried in St. Louis County. Circuit judges routinely deny evidentiary hearings in death penalty postconviction cases. *See e.g. State v. Brooks*, 960 S.W.2d 479 (Mo.banc1997); *State v. Ferguson*, 20 S.W.3d 485 (Mo.banc2000); *Morrow v. State*, 21 S.W.3d 819 (Mo.banc2000); *Smulls v. State*, 71 S.W.3d 138 (Mo.banc2002); *Barnett v. State*, 103 S.W.3d 765 (Mo.banc2003); and *Goodwin v. State*, S.Ct. No. 86278. In contrast, all the other circuit courts routinely grant hearings.<sup>6</sup>

Rule 29.15(h)'s plain language encourages evidentiary hearings. *Wilkes v. State*, 82 S.W.3d 925, 929 (Mo.banc2002). "An evidentiary hearing may only be denied when the record *conclusively* shows that the movant is not entitled to relief." *Id.* at 928 (emphasis in original). This Court should require circuit courts follow this directive, especially in death penalty cases. As our Chief Justice noted:

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<sup>6</sup> The one exception was during the late 1980s and 1990s when Judge Shinn from Jackson County denied hearings in four cases. *White v. State*, 939 S.W.2d 887 (Mo.banc1997); *State v. Smith*, 944 S.W.2d 901 (Mo.banc1997); and *Carter v. State*, 955 S.W.2d 548 (Mo.banc1997); *State v. Owsley*, 959 S.W.2d 789 (Mo.banc1997).

I see little harm in giving a defendant, especially a death penalty defendant, one chance to present evidence that his counsel was ineffective.

*White v. State*, 939 S.W.2d 887, 904 -905 (Mo.banc1997) (White, J. concurring in part and dissenting in part). Seven years after this Court's decision, Mr. White received a hearing in federal court.<sup>7</sup> Once Judge Smith heard evidence, he concluded that White's counsel was ineffective for failing to call an eyewitness who directly implicated another person and exculpated White. See, Order Granting in Part Writ of Habeas Corpus in *White v. Roper*, Case No. 97-1663-CB-W-ODS (June 14, 2004) at 14-15.<sup>8</sup> Unfortunately, Mr. White had to spend more than fifteen years on death row before he had his chance to prove that his attorney was ineffective.

Mr. Williams asks that he be given his one chance to prove his claims of ineffectiveness and other constitutional violations pled in his 29.15 motion. Our rules and precedents require nothing less.

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<sup>7</sup> District Court Judge Ortrie D. Smith had twice denied Mr. White relief, without a hearing, but the Eighth Circuit reversed both times. *White v. Bowersox*, 206 F.3d 776 (8<sup>th</sup> Cir.2000); and *White v. Luebbers*, 307 F.3d 722 (8<sup>th</sup> Cir.2002).

<sup>8</sup> The court granted relief on two other grounds as well, one granting guilt phase relief and the other penalty phase relief.



## **POINTS RELIED ON**

### **I. Prosecutorial Misconduct**

The motion court clearly erred in denying, without a hearing, Mr. Williams' claims that the prosecutor engaged in misconduct and trial counsel was ineffective, because this denied Mr. Williams due process, and effective assistance of counsel under U.S.Const.,Amends. VI and XIV; Mo.Const.,Art. I, §§10 and 18(a), Rule 29.15(h), in that the motion alleged that the prosecutor:

- A. concealed the whereabouts of Henry Cole and Laura Asaro so that counsel could not effectively investigate and discover exculpatory and impeachment evidence;
- B. failed to disclose exculpatory information, records that would have impeached Cole and Asaro, including drug treatment records, mental health records, and prison and jail records; and
- C. provided incriminating information about Mr. Williams to John Duncan and Kimber Edwards and tried to manufacture evidence against Mr. Williams, calling into question the veracity of the State's paid informants who testified at trial and trial counsel did not investigate these witnesses.

**Mr. Williams was prejudiced since Cole and Asaro were key to the State's case and had Mr. Williams counsel had access to all this impeaching material, there is a reasonable likelihood that the jury would not have convicted him.**

*Kyles v. Whitley*, 514 U.S. 419 (1995);

*State v. Robinson*, 835 S.W.2d 303 (Mo.banc1992);

*State v. Newton*, 925 S.W.2d 468 (Mo.App.E.D.1996);

*Carriger v. Stewart*, 132 F.3d 463 (9thCir.1997).

## **II. Henry Cole: Jailhouse Informant**

**The motion court clearly erred in denying a hearing on the claims that counsel was ineffective in failing to investigate and impeach Henry Cole and establish that he was mentally ill, unreliable and incompetent, denying Mr. Williams due process, a fair trial, effective counsel, and freedom from cruel and unusual punishment, U.S.Const., Amend. V, VI, VIII, XIV in that the motion alleged that counsel failed to investigate:**

- A. witnesses, Johnifer Cole Griffin, Bridget Griffin, Ronnie Cole, Durwin Cole, Twana “Coco” Cole, who would have testified that Cole lied about Mr. Williams confessing, referring to his story as one of his capers; had made similar false allegations in the past; would say anything to get the reward money; and was being treated with antipsychotic medication for his mental illness, including hallucinations; and**
- B. investigate, consult and present expert testimony to establish that Cole is mentally ill, which was relevant to show Cole was incompetent to testify and to impeach him;**

**Mr. Williams was prejudiced as Cole was a critical state witness, testifying that Mr. Williams confessed to committing the charged offense.**

*Wiggins v. Smith*, 123 S.Ct. 2527 (2003);

*State v. Long*, 140 S.W.3d 27 (Mo.banc2004);

*State v. Newton*, 925 S.W.2d 468 (Mo.App.E.D.1996);

*Sederes v. State*, 776 S.W.2d 479 (Mo.App.E.D.1989).

### **III. Ineffective Assistance: Failing to Investigate Laura Asaro**

The motion court clearly erred in denying, without a hearing, Mr. Williams' claims that counsel was ineffective for failing to investigate and rebut Laura Asaro's testimony, because counsel's failure denied Mr. Williams due process and effective assistance of counsel, U.S.Const.,Amends. VI and XIV; Mo.Const.,Art. I, §§10, 18(a), Rule 29.15(h), in that the motion alleged that counsel acted unreasonably in failing to:

A. interview and call witnesses, Edward Hopson and Colleen Bailey, who would have testified that Asaro admitted setting Mr. Williams up to get the \$10,000 reward, had a motive to lie as she was addicted to drugs and desperately needed crack cocaine, and had made prior false accusations against others;

B. interview and call Cynthia Asaro, Walter Hill, Theon Shear, Quilon Hill, Shenita Hill, Billy Hill, and James Hill who could have rebutted Asaro's guilt phase testimony that Mr. Williams drove his car on the date of the alleged offense and that she did not have access to the car, as the witnesses knew the car was not operational on that day, and that she had a set of keys to the car and got into the trunk after Mr. Williams was jailed;

C. test Asaro's blood, hair and fingerprints to connect her to the crime scene; and

**D. investigate and call Walter Hill and introduce his phone records to show Asaro was lying when she testified that Mr. Williams called her via a 3-way phone and threatened her; and Mr. Williams was prejudiced as this evidence would have shown that Asaro was not truthful and could not be believed and would have supported counsel's defense that Asaro was involved in the killing and was blaming it on Mr. Williams.**

*Wiggins v. Smith*, 539 U.S. 510 (2003);

*Black v. State*, S.Ct. 85535 (Mo.banc,Nov. 23, 2004);

*Moore v. State*, 827 S.W.2d 213 (Mo.banc1992);

*Wolfe v. State*, 96 S.W.3d 90 (Mo.banc2003).

#### **IV. Discovery in A Rule 29.15 Proceeding**

**The motion court abused its discretion in overruling Mr. Williams' motion to compel production of documents, Asaro's drug treatment records, Cole and Asaro's mental health records and corrections records, and police reports, and subsequent motions to compel disclosure, because the rulings violated Mr. Williams' rights to due process, compulsory process, confrontation, to present a defense, effective assistance of counsel, freedom from cruel and unusual punishment, and a full and fair hearing, U.S.Const., Amends. VI, VIII, XIV; Mo.Const.,Art. I, §§10, 18(a), and 21, and Rules 29.15(e) and (h), 56.01 and 58.01, in that the evidence was necessary to prove Mr. Williams' claims of prosecutorial misconduct in failing to disclose impeaching material of Cole and Asaro, state misconduct in presenting false evidence at trial regarding Mr. Williams' car, and trial counsel's ineffectiveness in failing to investigate Cole and Asaro, and that another person committed the crime.**

*Kyles v. Whitley*, 514 U.S. 419, 437 (1995);

*State v. Robinson*, 835 S.W.2d 303 (Mo.banc1992);

*State v. Newton*, 925 S.W.2d 468 (Mo.App.E.D.1996);

*Carriger v. Stewart*, 132 F.3d 463 (9thCir.1997).

## **V. Appellate Counsel's Failure to Brief Error in Denying a Continuance**

**The motion court clearly erred in denying an evidentiary hearing on Mr. Williams' claim that he was denied effective assistance of appellate counsel, due process, and freedom from cruel and unusual punishments, U.S. Const., Amend. VI, VIII, XIV, in that appellate counsel unreasonably failed to raise the trial court's error in overruling the continuance motion:**

- 1) the claim had significant merit since trial counsel lacked time to investigate and prepare;**
- 2) the law supported the claim;**
- 3) the claim was preserved; and**
- 4) appellate counsel pursued weaker issues, including five plain error claims.**

**Mr. Williams was prejudiced because, had the claim been raised, a reasonable probability exists that this Court would have granted a new trial, and with a continuance, counsel could have adequately prepared for guilt and penalty phase, creating a reasonable probability of a different outcome.**

*Evitts v. Lucey*, 469 U.S. 387 (1985);

*State v. Whitfield*, 837 S.W.2d 503 (Mo.banc1992);

*State v. McIntosh*, 673 S.W.2d 53 (Mo.App.W.D.1984);

*State v. Perkins*, 710 S.W.2d 889 (Mo.App.E.D.1986).



**VI. Counsel Ineffective For Failing to Offer Instruction That Evidence of Attempted Escape Could Only Be Used to Show Consciousness of Guilt**

The motion court clearly erred in denying, without a hearing, Mr. Williams' claim that counsel was ineffective for failing to offer an instruction that evidence of attempted escape and jail assault was admitted for a limited purpose, to show Mr. Williams consciousness of guilt, because counsel's failure denied Mr. Williams due process and effective assistance of counsel, U.S.Const.,Amends. VI and XIV; Mo.Const.,Art. I, §§10, 18(a), Rule 29.15(h), in that the motion alleged that counsel acted unreasonably in failing to submit the limiting instruction, counsel's failure was not strategic as his motion for new trial alleged error in the trial court's failure to give the instruction, and Mr. Williams was prejudiced as the State's case was not strong, but relied on two paid informants who had been impeached, and without a limiting instruction, the jury likely considered the evidence of Mr. Williams escape attempt where he allegedly assaulted a guard and expressed his desire to kill a guard as evidence that he was violent and the type of person who would have committed the charged offense.

*Strickland v. Washington*, 466 U.S. 668 (1984);

*Comm. v. Billa*, 555 A.2d 835 (Pa.1989);

*Deck v. State*, 68 S.W.3d 418 (Mo.banc2002);

*State v. Blue*, 811 S.W.2d 405 (Mo.App.E.D.1991).

## **VII. Mitigation**

**The motion court clearly erred in denying, without a hearing, Mr. Williams' claim that trial counsel was ineffective for failing to investigate and psychological testimony to explain the aggravating circumstances and failing to investigate and present a complete social history because counsel's failure denied Mr. Williams due process, effective assistance of counsel, and freedom from cruel and unusual punishment, U.S.Const.,Amends. VI, VIII, XIV; Mo.Const.,Art. I, §§10, 18(a), and 21, Rule 29.15(h), in that the motion alleged facts, not conclusions, that entitled him to relief; specifically, that counsel failed to investigate, consult with and present psychological testimony of an expert such as Dr. Cross or Dr. Cunningham, to explain the aggravators of Mr. Williams' prior criminal history; and failed to investigate Mr. Williams' family background through witnesses, Jimmy Williams, Latonia Hill, Walter Hill, Ella Williams Alexander, Patricia Larue, and Mr. Williams, who could have testified that Mr. Williams' mother resented him as she accidentally became pregnant with him, his father abandoned him, he suffered physical and sexual abuse as a child, he was exposed to violence, drugs and alcohol at a young age, his family used violence to deal with conflict, the family condoned criminal behavior, including substance abuse, and his turbulent family history resulted in multiple moves and shifting to different schools, never allowing Mr. Williams to have stability and to adjust to his environment.**

**Had jurors heard all this evidence there is a reasonable probability they would have imposed a life sentence.**

*Wiggins v. Smith*, 123 S.Ct. 2527 (2003);

*Williams v. Taylor*, 529 U.S. 362, 120 S.Ct.1495 (2000);

*Hutchison v. State*, S.Ct. No. 85548 (Mo.banc, Dec. 7, 2004);

*State v. Blue*, 811 S.W.2d 405 (Mo.App.E.D.1991).

### **VIII. Aggravators Must Be Pled in Indictment**

**The motion court clearly erred denying the claim that the indictment charged Mr. Williams with unaggravated first degree murder and that trial counsel were ineffective for failing to object to the indictment because Mr. Williams was denied his rights to due process, a jury trial, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S.Const. Amends. VI, VIII, XIV, in that the indictment and substitute information failed to plead any aggravating circumstances, thereby charging Mr. Williams with unaggravated first degree murder, authorizing the punishment of life without probation or parole. Reasonably competent trial counsel would have raised this jurisdictional defect and Mr. Williams was prejudiced because he would have been sentenced to the maximum of life in prison.**

*Blakely v. Washington*, 124 S.Ct. 2531 (2004);

*Jones v. United States*, 526 U.S. 227 (1999);

*Ring v. Arizona*, 536 U.S. 584 (2002);

*State v. Nolan*, 418 S.W.2d 51 (Mo.1967).

# **IX. Appellate Counsel's Failure to Brief The Exclusion of Mitigation**

The motion court clearly erred in denying an evidentiary hearing on Mr. Williams' claim that he was denied effective assistance of appellate counsel, due process, and freedom from cruel and unusual punishments, U.S. Const., Amend. V, VI, VIII, XIV, in that appellate counsel unreasonably failed to raise the trial court's error in excluding Dr. Cunningham's testimony regarding the impact Mr. Williams' execution would have on his children since:

- 1) the claim had significant merit since any evidence reflecting on Mr. Williams' character was relevant mitigation;
- 2) the law, particularly *Lockett* and *Penry*, supported the claim;
- 3) the claim was preserved; and
- 4) appellate counsel pursued weaker issues, including five plain error claims.

Mr. Williams was prejudiced because, had the claim been raised, a reasonable probability exists that this Court would have granted a new penalty phase, and with the additional mitigation, there is a reasonably likelihood that the jury would have sentenced Mr. Williams to life.

*State v. Stevens*, 879 P.2d 162 (Or.1994);

*Lockett v. Ohio*, 438 U.S. 586 (1978);

*Penry v. Lynaugh*, 492 U.S. 302 (1989);

*Evitts v. Lucey*, 469 U.S. 387 (1985).

## **X. Lethal Injection Is Cruel and Unusual Punishment**

**The motion court clearly erred in denying a hearing on the claim that lethal injection is unconstitutional, as applied in Missouri, because that ruling denied Mr. Williams his rights to due process and to be free from cruel and unusual punishment, U.S.Const.Amends. VIII and XIV, and Rule 29.15(h), in that the motion alleged facts, not conclusions, that entitled him to relief; specifically, that Missouri's method of execution is flawed in that it causes unnecessary pain as evidenced by 12 other executions that encountered problems and resulted in prolonged and unnecessary pain and the problems will likely reoccur since the Missouri statute confers unlimited discretion to the Department of Corrections and the procedures and protocols do not include safeguards regarding the manner in which executions should occur, fail to establish minimum qualifications and expertise for personnel conducting executions, and do not provide criteria and standards for the lethal injection procedures, but use drugs that allow unnecessary pain and suffering; the allegations were not refuted by the record; and Mr. Williams was prejudiced since these problems will likely reoccur.**

*Nelson v. Campbell*, 124 S.Ct. 2117 (2004);

*Glass v. Louisiana*, 471 U.S. 1080 (1985);

*In re Kemmler*, 136 U.S. 436 (1890);

*Morrow v. State*, 21 S.W.3d 819 (Mo.banc2000).

## **XI. Hearing on Trial Counsel's Conflict of Interest**

**The motion court clearly erred in denying a hearing on the claim that trial counsel had a conflict of interest and the trial court failed to conduct an inquiry into the conflict, because that ruling denied Mr. Williams his rights to due process and to effective assistance of counsel, U.S.Const.Amends. VI and XIV, and Rule 29.15(h), in that the motion alleged facts, not conclusions, that entitled him to relief; specifically, that Mr. Williams had filed a motion before trial informing the trial court of counsel's conflict of interest, the trial court conducted no inquiry about the factual basis for this motion, and Mr. Williams was prejudiced as he was forced to proceed to trial with counsel whom he did not trust, could not communicate, and had not fully investigated his case.**

*Mickens v. Taylor*, 535 U.S. 162 (2002);

*State v. Owsley*, 959 S.W.2d 789 (Mo.banc1997);

*United States v. Blum*, 65 F.3d 1436 (8thCir.1995);

*Smith v. Lockhart*, 923 F.2d 1314 (8thCir.1991).

## **XII. Mr. Williams' Right to Testify in Penalty Phase**

**The motion court clearly erred in denying Mr. Williams' claim that he was denied his right to testify and counsel were ineffective in failing to advise him of this right because this denied him his rights to due process, compulsory process, the right to testify, effective assistance of counsel, and freedom from cruel and unusual punishment, U.S.Const.Amends. V, VI, VIII, XIV, in that counsel unreasonably failed to tell Mr. Williams that he had a right to testify in penalty phase and Mr. Williams was prejudiced because his testimony could have explained that he obtained the victim's husband's laptop computer from Asaro, contradicting both Asaro and Cole's testimony, thereby undermining the confidence in the outcome.**

*Rock v. Arkansas*, 483 U.S. 44 (1987);

*Jones v. Barnes*, 463 U.S. 745 (1983);

*United States v. Lore*, 26 F.Supp.2d 729 (N.J.D.C.1998);

*United States v. Teague*, 953 F.2d 1525 (11thCir.1992).



### **XIII. Mr. Williams' Right to Reject Appointed Counsel**

#### **Under Rule 29.16**

**The motion court erred in denying Mr. Williams' motions to reject the appointment of counsel and his Rule 75.01 motion for reconsideration, thereby denying him due process, meaningful access to the courts, self-representation, and conflict-free counsel, U.S.Const.,Amends. VI and XIV, Mo.Const.,Art. I, §§10 and 18(a), and his rights under Rule 29.16, in that the court failed to determine whether Mr. Williams was competent to reject the appointment of counsel and whether he did so understanding its legal consequences, as required by Rule 29.16(a). The record shows he is competent and understands the legal consequences, and should have been allowed to reject appointed counsel.**

*Bittick v. State*, 105 S.W.3d 498 (Mo.App.W.D.2003);

*Faretta v. California*, 422 U.S. 806 (1975);

*Ford v. Wainwright*, 477 U.S. 399 (1986);

*Wolff v. McDonnell*, 418 U.S. 539 (1974);

Rule 29.16(a).

## **ARGUMENT**

### **I. Prosecutorial Misconduct**

The motion court clearly erred in denying, without a hearing, Mr. Williams' claims that the prosecutor engaged in misconduct and trial counsel was ineffective, because this denied Mr. Williams due process, and effective assistance of counsel under U.S.Const.,Amends. VI and XIV; Mo.Const.,Art. I, §§10 and 18(a), Rule 29.15(h), in that the motion alleged that the prosecutor:

- A. concealed the whereabouts of Henry Cole and Laura Asaro so that counsel could not effectively investigate and discover exculpatory and impeachment evidence;
- B. failed to disclose exculpatory information, records that would have impeached Cole and Asaro, including drug treatment records, mental health records, and prison and jail records; and
- C. provided incriminating information about Mr. Williams to John Duncan and Kimber Edwards and tried to manufacture evidence against Mr. Williams, calling into question the veracity of the State's paid informants who testified at trial and trial counsel did not investigate these witnesses.

Mr. Williams was prejudiced since Cole and Asaro were key to the State's case and had Mr. Williams counsel had access to all this impeaching material, there is a reasonable likelihood that the jury would not have convicted him.

Mr. Williams' amended motion's first three claims alleged prosecutorial misconduct in failing to disclose exculpatory information, impeachment material for its two key witnesses, Henry Cole and Laura Asaro. The motion alleged that the State tried to manufacture evidence against Mr. Williams, by giving potential witnesses incriminating information and offering them benefits to testify against Mr. Williams. The motion also alleged trial counsel's ineffectiveness in how they dealt with this misconduct. The motion court denied all these claims without a hearing(L.F.780-84).

**A. Concealing Whereabouts of Cole and Asaro**

Claim (a) centered on the prosecutor's failure to disclose to the defense the addresses of Cole and Asaro(L.F.72-73, 94-108). The motion alleged that the prosecutor was in regular contact with both these witnesses, but actively concealed their whereabouts(L.F.95-97,99). Assistant Prosecuting Attorney, Keith Larner, told the court that Cole had AIDS when he knew he did not (L.F.97,99,D.L.F.224). Detective Dunn was in regular contact with Cole and bought a bus ticket to New York for him(L.F.99,102).

Similarly, Larner had interviewed Asaro three times, but told the court he was unable to find her(L.F.98). Larner was in regular contact with Asaro, because

he was prosecuting a robbery case<sup>9</sup> against Mr. Williams just before his murder trial was set to begin(L.F.103). Asaro was a state witness in that robbery case(L.F.103).

Larner concealed Asaro's whereabouts from the defense and refused to comply with discovery rules. Shortly before the robbery trial, the State contacted Asaro while she was in the City Jail, serving her with a subpoena(L.F.103). When Mr. Williams' counsel, Elizabeth Haines, learned of the subpoena, she tried to contact Asaro at the jail, but Asaro had been released(L.F.103-04). Larner refused to produce Asaro for a deposition(L.F.104). On March 29, 2001, just days before the April 2, 2001 trial, Haines saw a small woman, who looked like a drug addict, standing with Larner in front to the St. Louis County Justice Center (L.F.104). Haines approached the two and asked the woman her name(L.F.104). Asaro revealed her identity and disclosed that two prosecutors, Larner and Bishop, had interviewed her that afternoon(L.F.104). Larner tried to prevent Haines and her investigator from serving Asaro with a subpoena(L.F.104).

Haines deposed Asaro the next day and discovered that Larner had interviewed this witness three times and had taken notes, but he never disclosed these statements to the defense(L.F.104). He also failed to disclose a videotaped

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<sup>9</sup> The State submitted the robbery conviction to Mr. Williams' jury as an aggravator(Ex.232,D.L.F.528-29) and called that victim to testify at the penalty phase(Tr.3143-67).

statement, an audiotaped statement, and a written statement before trial(L.F.104).  
Larner disclosed the videotaped statement late, during trial(L.F.104).

At the same time as he concealed Asaro and her statements in the robbery case, Larner also concealed her whereabouts in the death penalty case. Larner stood silently by as trial counsel complained in open court about how difficult these witnesses were to track down and investigate(L.F.98-99,Tr.30-31).

Trial counsel wanted to investigate Cole and Asaro, but could not obtain information(L.F.99-100). They requested impeaching evidence: Asaro and Cole's prior relationship with the State as informants; psychological, drug and alcohol treatment records; and criminal records(L.F.99-100). Counsel requested correspondence between Cole and the State, handwritten notes from Cole made during his videotaped statement, and records of the police payments to Cole (L.F.101).

Not only did Larner fail to disclose these records, he asked the Court to preclude the defense from having access to this impeaching material(L.F.101). The State filed motions in limine to preclude the defense's reference to Cole's treatment in a mental health facility or his treatment by a psychiatrist or psychologist(D.L.F.405), and to preclude reference to Asaro and Cole's psychiatric history(D.L.F.442).

The State did not even provide a copy of Cole and Asaro's arrests and convictions until June 1, 2001, the Friday before trial began on Monday, June 4, 2001(D.L.F.471,Tr.136).

Trial counsel requested a continuance<sup>10</sup> to fully investigate Asaro and Cole and to deal with the State's nondisclosure or late disclosure(L.F. 101).

The amended motion alleged prejudice from the State's nondisclosure (L.F.105-07). The witnesses' mental health problems were relevant to impeach them and to challenge their competency(L.F.105). The other records also would have contained impeachment evidence as Cole had a history of fabricating evidence to gain leniency or other benefits(L.F.105). Impeachment was critical since Larner argued to the jury that Cole and Asaro were credible witnesses (L.F.105-06). Having frustrated the defense's rights to discovery, Larner then commented on defense counsel's failure to impeach the witnesses(L.F.106-07).

The court denied this claim without a hearing, ruling that the pleadings contained only conclusions, and did not state what information would be included in psychological or prison records, that the information would have been admissible, or how it would have affected Cole and Asaro's credibility(L.F.781). The court found that since counsel conducted thorough depositions several months before trial, Mr. Williams was not prejudiced by the State's failure to disclose their whereabouts(L.F.781-82). The Court concluded that the State's failure to disclose as required by the rule was a trial error and outside the scope of a Rule 29.15 motion(L.F.782).

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<sup>10</sup> The continuance motion is discussed in Point V, *infra*.

## **B. Failure to Disclose Impeaching Information**

Claim (c) alleged prosecutorial misconduct in failing to disclose impeaching evidence: Cole and Asaro's drug treatment records, mental health records, and prison and jail records(L.F.114-21). Larner not only failed to disclose these records, but hindered counsel's ability to get them, telling Cole not to sign a release for this material(L.F.114). Larner also filed a motion in limine to preclude defense counsel from impeaching these witnesses with evidence of their drug addiction or mental illness(L.F.114).

During Cole's deposition, doctors were treating him at a mental hospital for Depression(L.F.115). Doctors prescribed him psychiatric medication(L.F.116). However, he did not regularly take his medication(L.F.116). A psychiatrist from St. Luke's Roosevelt Hospital treated Cole(L.F.116).

The amended motion specified Cole' drug use and treatment. During the 1990s, Cole received drug treatment at numerous institutions, St. Luke's Hospital, CMC on Delmar, Department of Corrections at Farmington, Missouri, St. Louis City Workhouse, Roosevelt Hospital in New York and Interfaith Hospital in Brooklyn, New York(L.F.116). Cole's treatment spanned the time when he made allegations about Mr. Williams to the time of trial(L.F.116). Cole admitted using drugs, including crack cocaine, marijuana, heroin and PCP(L.F.142). Cole had hallucinated and lost his memory because of the drug use(L.F.117). He also went on drinking binges, resulting in further memory loss(L.F.117).

Cole had at least twelve prior convictions, and had provided testimony while in prison(L.F.117). Counsel only received a copy of these convictions on the Friday before trial and did not have any of his prison records(D.L.F.471,Tr.136).

Like Cole, Asaro received treatment at mental facilities, including stays at St. Louis Empowerment Center, New Beginnings, Queen of Peace and Booneville Treatment Center for Women(L.F.117-18). However, she gave inconsistent and varying accounts of her treatment and minimized her addiction(L.F.117). She admitted being treated by a psychiatrist, but would not reveal his name or when she had seen him(L.F.117-18). She applied for disability benefits due to her mental problems(L.F.118). A judge ordered drug treatment at New Beginnings shortly before trial when she was deposed(L.F.118).

The State disclosed none of these records to the defense, and sought to preclude any impeachment about these matters(L.F.120-21). These records were relevant to impeach the witnesses(L.F.120-21). Had the jury known all this exculpatory information, the witnesses would have been discredited and the jury likely would not have convicted Mr. Williams and sentenced him to death. *Id.*

The court ruled that the claim pled conclusions, since it did not allege what was contained in the mental health and alcohol treatment records or how he was prejudiced(L.F.783-84).



### **C. Manufacturing Evidence**

Claim (b) alleged that the State tried to manufacture evidence against Mr. Williams by giving witnesses incriminating information about Mr. Williams and then offering benefits to the witnesses if they would testify about the incriminating information provided(L.F.73-74,108-14). The motion specified the witnesses, John Duncan and Kimber Edwards, and their testimony(L.F.108-112). The motion also outlined counsel's ineffectiveness in failing to investigate the State's conduct with these witnesses(L.F.111-114).

The court found that neither Duncan, nor Edwards, testified at trial and the motion did not allege that counsel was ineffective for failing to call these witnesses. Rather the motion alleged counsel's failure to investigate them (L.F.782-83). Additionally, the allegation that Duncan would have testified that Mr. Williams did not confess to the murder to Hose was not impeaching since Hose did not testify about the alleged confession(L.F.783). Duncan and Edwards' testimony would not have provided a viable defense and was not even impeaching, under the court's analysis(L.F.783). Thus, Mr. Williams was not prejudiced (L.F.783).

### **Standard of Review**<sup>11</sup>

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<sup>11</sup> The standard of review is the same for Points I-III, V-XI, all claims denied without a hearing. To avoid unnecessary repetition, Mr. Williams does not discuss the standard in detail in these subsequent arguments.

This Court reviews the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819, 822(Mo.banc2000); *Rule 29.15(k)*.

Findings are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209(Mo.banc1996).

A motion court must hold an evidentiary hearing if (1) the movant cites facts, not conclusions that, if true, would entitle him to relief; (2) the factual allegations are not refuted by the record, and (3) the matters complained of prejudiced the movant. *Wilkes v. State*, 82 S.W.3d 925, 929(Mo.banc2002). "An evidentiary hearing may only be denied when the record *conclusively* shows that the movant is not entitled to relief." *Id.* at 928 (emphasis in original).

The prosecution must produce exculpatory information, including impeaching material, under the Due Process Clause of the United States Constitution. *United States v. Bagley*, 473 U.S. 667, 674-77(1985); *Brady v. Maryland*, 373 U.S. 83, 86-89(1963). Nondisclosure violates due process "irrespective of the good faith or bad faith of the prosecution." *Kyles v. Whitley*, 514 U.S. 419, 437(1995). While some courts would allow the prosecution to evade this duty by never gaining "possession" of the mental health records, this Court rejected such an approach, saying it "fails to recognize the nature of the prosecutor's role in the system." *State v. Robinson*, 835 S.W.2d 303, 306-07 (Mo.banc1992).

Mr. Williams is entitled to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687(1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). To establish a violation of that right, Mr. Williams must show that counsel's performance was deficient and prejudice resulted.

Like claims of ineffective assistance, claims of prosecutorial misconduct are cognizable in a Rule 29.15 action. *See, e.g., Hayes v. State*, 711 S.W.2d 876, 876-77(Mo.banc1986) (failure to disclose a bargain with a witness constituted withholding of material evidence, violating due process under *Brady, supra* and *Napue v. Illinois*, 360 U.S. 264, 269(1959) and entitled Hayes to postconviction relief); *State v. Phillips*, 940 S.W.2d 512,516-18 (Mo.banc1997)(granting postconviction relief because of the State's failure to disclose statement that Phillips' son dismembered the victim's body). Thus, to the extent that the motion court denied these claims because they were not cognizable(L.F.782), the court clearly erred.

#### **A. and B. Impeaching Asaro and Cole**

The court's finding that the amended motion did not adequately plead what the records would have shown(L.F.781,783-84) is clearly erroneous. The pleadings specifically alleged that Cole had major psychiatric disorders, hallucinated, and suffered memory loss. He used cocaine, marijuana, heroin and PCP. Similarly, the motion detailed Asaro's psychiatric and drug treatment. The mental health records and drug treatment records would have documented the witnesses' problems and provided impeaching material(L.F.105). The motion

alleged that the correction records would have contained impeachment material since Cole had a history of fabricating evidence to gain leniency and receive benefits(L.F.105).

Contrary to the court's findings, the amended motion specifically pled facts showing Mr. Williams was entitled to relief.<sup>12</sup> The motion alleged that both witnesses were mentally ill and suffered from hallucinations. Mental illness is relevant both to impeach a witness and determine competence. *State v. Robinson*, 835 S.W.2d 303, 306-07(Mo.banc1992); *State v. Newton*, 925 S.W.2d 468, 471-72 (Mo.App.E.D.1996); *United States v. Golyansky*, 291 F.3d 1245, 1248 (10<sup>th</sup> Cir.2002); *East v. Johnson*, 123 F.3d 235, 238(5<sup>th</sup> Cir.1997); *United States v. Lindstrom*, 698 F.2d 1154, 1163-64(11<sup>th</sup> Cir.1983); *United States v. Jimenez*, 256 F.3d 330, 343-44(5<sup>th</sup> Cir.2001). Thus, a patient's privilege in his or her psychological records must give way to a defendant's right to confrontation. *Newton, supra* at 471, relying on *United States v. Nixon*, 418 U.S. 683, 709-15 (1974).

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<sup>12</sup> Alternatively, the motion court erred in not providing these records so that postconviction counsel could plead with even greater specificity than they did. Counsel sought disclosure of these records before the amended motion was filed, but the motion court denied the requests(L.F.42-48,49-55,66-68). The denial of discovery in the 29.15 action is raised in Point IV, *infra*.

Hallucinations are relevant to a witness' ability to discern reality. *Newton*, *supra* at 471; *United States v. Pryce*, 938 F.2d 1343, 1346(D.C.Cir.1991); *East v. Johnson*, *supra* at 238. Mental illness can cripple a witness' memory. *State v. Pinkus*, 550 S.W.2d 829, 839-40(Mo.App.S.D.1977).

Thus, in *Newton*, Judge O'Brien committed reversible error for failing to conduct an *in camera* review of a State's key witness' psychological records. *Newton*, *supra* at 471-72. Evidence of hallucinations could affect a witness' competency to testify. *Id.* Therefore, the Court of Appeals ordered Judge O'Brien to conduct an *in camera* review of these records on remand to determine if they contained relevant material. *Id.* at 473.

Here, Cole and Asaro both admitted hallucinating and suffering from memory loss. Cole was in a mental hospital when counsel deposed him. A judge ordered Asaro receive treatment just before trial. Thus, both witnesses' records were relevant for competency and to confront the witnesses. Judge O'Brien knew they were relevant, since he was the trial judge in *Newton*, where similar allegations triggered the *in camera* review. Defense counsel should have discovered the extent of Asaro and Cole's mental illness and the impact it had on their memories. The prosecutor had a duty to disclose these records, even if they were not in their physical possession. *Newton*, *supra* at 472; *Robinson*, 835 S.W.2d at 306.

The witnesses' criminal records and penitentiary records were also discoverable impeaching evidence. *Crivins v. Roth*, 172 F.3d 991, 996(7<sup>th</sup> Cir.

1999); *Carriger v. Stewart*, 132 F.3d 463, 479-82(9<sup>th</sup> Cir.1997). In *Crivins, supra*, the court found that the state's failure to provide a witness's criminal records denied him due process. The opportunity to ask about criminal history was no substitute for disclosure. *Id.*

In *Carriger*, the State's failure to produce Dunbar's Corrections file, showing a long history of lying and attempting to pin his crimes on others violated *Brady*. 132 F.3d at 479-82. Even though the individual prosecutors never possessed Dunbar's file, they had a duty to learn of exculpatory evidence. *Id.*, at 479. The error was prejudicial since the prosecutor vouched for Dunbar's credibility and assured that "if there was any indication of his guilt or complicity in this, he would be on trial with Carriger." *Id.* at 480. Like Cole, Dunbar was impeached with some prior convictions. *Id.*, at 481. However, his pattern of lying to the police and blaming others to cover up his own guilt was significant. *Id.*, at 481. Here, too, Cole's records were also important to show his long history of lying and blaming others.

The court's conclusion that Mr. Williams was not prejudiced(L.F.781-82) is contrary to the record. Trial counsel told the court, after deposing Asaro and Cole, that they needed to do additional investigation(D.L.F.395,Tr.1630-31). They wanted more time to follow-up and investigate leads, including the witnesses' mental illness, corrections records and drug treatment records(Tr.1630-31). Counsel did a good job impeaching the witnesses on limited areas, like the reward they were getting in exchange for their testimony, prior inconsistent statements,

and their prior convictions. However, counsel did not touch the subject matter of their mental illness, including hallucinations and memory loss. Counsel did not broach the subject of alcohol treatment. The witnesses' prior false allegations were not discovered or elicited to test their credibility.

When deciding if Mr. Williams' amended motion alleged prejudice, this Court must "evaluate the totality of the evidence - - 'both that adduced at trial, *and the evidence adduced in the habeas proceeding[s]*.'" *Wiggins v. Smith*, 123 S.Ct. 2527, 2543(2003), quoting *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1515 (2000)(emphasis in opinion). The motion court erroneously looked only at what counsel did at trial, rather than the trial evidence combined with the proposed postconviction evidence. Here, the amended motion alleged substantial impeaching material that the State failed to disclose. When this evidence is combined with the impeaching evidence adduced at trial, there is a reasonable probability that the outcome would have been different.

### **C. Manufacturing Evidence**

The State's case relied on the testimony of Cole and Asaro. Both witnesses agreed to testify so that they would receive part or all of the \$10,000.00 reward offered by the victim's family. The defense maintained that they both were lying and had manufactured their claims against Mr. Williams for their own personal gain. The defense presented a St. Louis Post-Dispatch employee(Tr.2820-28) to suggest that Cole had read about the crime in the newspaper. However, Cole reported details about the crime that did not appear in the newspaper accounts

(Tr.2831-2847). The defense provided no explanation for how Cole learned of these details.

Had the prosecution disclosed its tactics with Duncan and Edwards, or, alternatively, had counsel investigated these witnesses, counsel would have discovered an explanation for Cole learning about the incriminating details. The prosecutor's investigator fed witnesses important, incriminating facts, and then asked the witness to testify about the facts.

The motion court's suggestion that since Duncan and Edwards did not testify at trial, counsel could not have impeached them with this testimony, misses the point. Had the State disclosed this information, or had counsel discovered it, counsel could have called the witnesses to establish how other state witnesses, like Cole, learned about the incriminating details of the crime - - not from Mr. Williams, as Cole claimed, but from the police and prosecution.

The State should not intimidate witnesses or coach them to say whatever it needs to make its case. *See United States v. Scheer*, 168 F.3d. 445(11<sup>th</sup> Cir.1999) (government's failure to disclose the prosecutor's intimidation of key prosecution witness violated due process and was reversible error); *White v. Helling*, 194 F.3d 937(8<sup>th</sup> Cir.1999)(withheld evidence regarding timing of victim's identification of defendant as robber was material under *Brady*). In *White v. Helling*, the witness did not provide the information the State needed to win its case, so officers kept interviewing him, coaching him until his testimony fit within their theory. *Id.*



Here, the State's investigators kept interviewing witnesses, providing them facts to fit within their theory of Mr. Williams' guilt. The jury should have heard about the State's tactics. They call into question the credibility of both Cole and Asaro.

The record at trial supports the allegations of prosecutorial misconduct. The State never disclosed statements allegedly made by Mr. Williams. Nondisclosure of a defendant's statement is grounds for reversal. *State v. Scott*, 943 S.W.2d 730, 739 (Mo.App.W.D.1997). Here, it happened, not once, not twice, but four times (Tr.1790-95,2450-53,2601-2610,2619-21). The State sprung surprise after surprise on the defense, including threats allegedly made against Cole and Asaro for testifying against Mr. Williams (Tr.1875-80,2557-58).

When confronted with nondisclosure of these materials, Larner made excuses, saying he didn't think he had to disclose them (Tr. 1795), he just learned of the evidence (Tr.2451) or he didn't have physical possession of the police reports (Tr.1879-80,2558,2604-06). Even if Larner did not have the police reports in his possession, he had a duty to disclose them. Nondisclosure violates due process "irrespective of the good faith or bad faith of the prosecution." *Kyles v. Whitley*, 514 U.S. 419, 437(1995). "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, *including the police*." *Kyles, supra* at 437-438 (emphasis added).

Given this record, the court clearly erred in denying, without a hearing, the claims that the State failed to disclose relevant impeaching information.

Accordingly, this Court should reverse and remand for an evidentiary hearing on this claim.

## **II. Henry Cole: Jailhouse Informant**

**The motion court clearly erred in denying a hearing on the claims that counsel was ineffective in failing to investigate and impeach Henry Cole and establish that he was mentally ill, unreliable and incompetent, denying Mr. Williams due process, a fair trial, effective counsel, and freedom from cruel and unusual punishment, U.S.Const.,Amend. V, VI, VIII, XIV in that the motion alleged that counsel failed to investigate:**

- A. witnesses, Johnifer Cole Griffin, Bridget Griffin, Ronnie Cole, Durwin Cole, Twana “Coco” Cole, who would have testified that Cole lied about Mr. Williams confessing, referring to his story as one of his capers; had made similar false allegations in the past; would say anything to get the reward money; and was being treated with antipsychotic medication for his mental illness, including hallucinations; and**
- B. investigate, consult and present expert testimony to establish that Cole is mentally ill, which was relevant to show Cole was incompetent to testify and to impeach him;**

**Mr. Williams was prejudiced as Cole was a critical state witness, testifying that Mr. Williams confessed to committing the charged offense.**

Jailhouse informants have every incentive to manufacture confessions to obtain favorable treatment. Henry Cole poses even greater concerns: his own

family was ready, willing and able to testify against him. They did not trust him and believed he made up his story about Mr. Williams confessing to Ms. Gayle's murder. Cole bragged that he had a big caper going on and something big was coming. Cole's family knew that he had made similar false allegations in the past. Cole would say anything to get the reward money. His family could verify his mental problems, including his use of antipsychotic medication for his mental illness, and his hallucinations. Cole's mental illness was relevant to impeach him and to challenge his competency to testify. Given these factual allegations, the motion court erred in denying a hearing.

**A. Cole's Family**

Claim (d) alleged counsel's ineffectiveness for failing to investigate Cole's family(L.F.75-76,121-39). The claim was specific, listing the witnesses that should have been interviewed and outlining each witness' testimony: Johnifer Cole Griffin, Bridget Griffin, Ronnie Cole, Durwin Cole, Twana "Coco" Cole (L.F.121,123-38). Mr. Williams had asked his attorneys to talk to these witnesses, giving counsel their names(L.F.122-23). These witnesses were available and willing to testify(L.F.123).

Had counsel contacted these witnesses they would have discovered that Cole was lying about Mr. Williams and could not be believed. He wrote to his son, Johnifer, while he was in jail with Mr. Williams(L.F.128). He bragged that he had a caper going on and something big was coming(L.F.128). Johnifer knew what his father was up to, he had made false allegations in the past, beginning in

the 1980s and continuing throughout his life(L.F.126-27,129). He even lied to authorities about Johnifer, in order to get out of trouble(L.F.126). Cole was motivated by the reward money and was willing to scam the system for money (L.F.127-28).

Similarly, Cole's daughter, Bridget Griffin, knew that Cole could not be trusted(L.F.129-30). She knew of his reputation of providing false information to the police in exchange for leniency(L.F.130). She had personal knowledge of prior false allegations Cole had made(L.F.130).

Ronnie and Durwin Cole, Henry's nephews, confirmed that Cole had made false allegations and was unreliable(L.F.132,135). Cole concocted scams, lied about others, and then left town(Tr.132,135). Henry would do or say anything for money(L.F.131). When he made his allegations against Mr. Williams, he wanted money to go to New York(L.F.135).

Durwin also reported troubling information about Henry's mental problems (L.F.133-34). Henry hallucinated, seeing bugs in his glass when they were not there(L.F.134). He heard voices when no one else was present(L.F.133-34). He had antipsychotic medication, but did not always take his medication(L.F.133). He had been diagnosed with mental illness and received disability benefits (L.F.133).

Cole's niece, Twanna, confirmed these family accounts(L.F.136-37). She had witnessed her uncle's crazy and bizarre behavior(L.F.136). She knew Henry needed money for drugs and would provide false information to get it(L.F.137).

As with the rest of her family, she did not trust her uncle, based on his history of making false allegations(L.F.137).

The motion court found that these allegations were conclusory and did not provide Mr. Williams with a viable defense(L.F.784). The court ruled that the motion should have alleged Cole's "reputation in the community" for truthfulness (L.F.785). The court concluded that the testimony about prior bad acts and Cole's family dislike for him were irrelevant and inadmissible(L.F.784-85). The court found that trial counsel effectively attacked Cole's credibility at trial and thus was not ineffective for failing to investigate his family or impeach him with these witnesses(L.F.785).

#### **B. Cole's Mental Illness**

Claim (e) reiterated counsel's ineffectiveness in failing to interview Cole's family and discover his mental illness(L.F.76-78,139-51). Additionally, the claim faulted counsel for failing to obtain Cole's mental health records and failing to litigate Cole's competency to testify at Mr. Williams' trial. *Id.*

Specifically, counsel did not request Cole's prior psychiatric evaluation, and they did not file motions to compel disclosure of his mental health treatment records once the prosecutor<sup>13</sup> advised Cole not to sign releases for counsel, and they did not hire an expert, such as Dr. Cross, to interview family and Cole's history to determine competency(L.F.139-50). Had counsel adequately investigated, they would have discovered that Cole hallucinated and experienced

memory loss(L.F.146). Counsel would have learned that he was hospitalized at Hopewell Mental Health Center for mental illness and psychiatric disorders (L.F.146-47). His treatment continued during the 1990s, near the time of his allegations against Mr. Williams(L.F.147). Cole received SSI benefits for his mental disabilities(L.F.147).

Dr. Cross' evaluation of Cole found symptoms consistent with a mood disorder with psychotic features, such as Schizophrenia, Major Depression, and Affective Disorder(L.F.148). The doctor identified psychotic episodes(L.F.148). Cole's prior history of lying and fabricating evidence was part and parcel of his mental illness(L.F.147). The motion alleged prejudice as Cole's mental illness would have been relevant both to impeach Cole and to challenge his competency (L.F.77-78,150).

The motion court found that these allegations were conclusory and provided no basis for a finding that Cole was incompetent, or suffered from a mental disease or defect at the time of the crime(L.F.786). That Cole could have been incompetent would not provide a viable defense(L.F.786). The court would require an adjudication of Cole's incompetence to hold a hearing on this claim (L.F.786).

### **Standard of Review**

These findings are reviewed for clear error. *See*, Point I, *supra*. To establish ineffective assistance, Mr. Williams must show that counsel's

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<sup>13</sup> The prosecutor's actions are discussed in detail and challenged in Point I, *supra*.

performance was deficient and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687(1984); *Williams v. Taylor*, 529 U.S. 362, 390-91(2000).

Contrary to the court's finding, impeaching Henry Cole, the state's central witness, was important and would have provided a defense. A witness' bias and motive to lie is always admissible and relevant. *State v. Ofield*, 635 S.W.2d 73, 75 (Mo.App.W.D.1982). A party may prove that bias through extrinsic evidence. *Id.* "The exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). *See also, State v. Long*, 140 S.W.3d 27 (Mo.banc2004) (extrinsic evidence of prior false allegation made by a prosecuting witness may be admissible).

Accordingly, counsel can be ineffective in failing to impeach a witness on a critical issue. *Black v. State*, S.Ct. 85535, slip op. at 8-13(Mo.banc,Nov. 23, 2004) (counsel ineffective for failing to impeach four witnesses with prior inconsistent statements that would have showed the murder was not deliberate); *Hadley v. Groose*, 97 F.3d 1131, 1133-36(8th Cir. 1996) (counsel ineffective in failing to impeach police officer with report that showed no footprints in the snow outside victim's trailer where footprints supposedly created a trail to Hadley); *Beltran v. Cockrell*, 294 F.3d. 730, 734(5thCir.2002) (failure to impeach eyewitnesses' testimony that Beltran was the only person they chose from a photographic array with their prior, tentative identifications of others, was ineffective); *Driscoll v. Delo*, 71 F.3d. 701,709-11(8thCir.1995) (failure to impeach the state's eyewitness



with prior inconsistent statement, in which Driscoll never admitted to stabbing the victim ineffective).

Counsel complained that they did not have sufficient time to fully investigate Cole(D.L.F.395). They wanted to get his correction records from Missouri, Pennsylvania, Michigan and the Federal Bureau of Prisons. *Id.* In counsel's motion for new trial, they acknowledged they had not effectively investigated the case and adequately cross-examined the State's witnesses due to the denial of their continuance motion(D.L.F.543). *See, State v. Howard*, 805 So.2d 1247(La.App.2002)(denial of continuance to allow preparation time resulted in ineffective assistance).

Given the facts alleged in the motion, supported by the record, the motion court should have granted a hearing. Cole's family provided his motivation for testifying falsely about Mr. Williams. They revealed prior false allegations that Cole had made against others, relevant impeaching evidence. Most disturbing, however, is Cole's admission that he had a caper going on while he was in jail with Mr. Williams. Cole's family knew that he was making up his story against Mr. Williams to get something big, the \$10,000.00 reward.

The motion court's requirement that pleadings allege Cole's "reputation in the community" for truthfulness is contrary to *Long, supra*. Extrinsic evidence of prior false allegations made by a prosecuting witness is admissible where the credibility of the witness is the crucial issue. *Id.* at 30-31. To admit false allegation, one must show legal relevance, the probative value must outweigh the

potential prejudice. *Id.* at 31. Similarities between the prior false allegations and the charged offense are important, but not decisive. *Id.* The circumstances under which the allegation was made factor into the analysis. *Id.*

Like *Long*, here, the witnesses could have provided extrinsic evidence of Cole's prior false allegations against others. Cole had falsely accused family members in exchange for benefits or leniency. He would lie for money. Thus, it is not surprising that he would make false allegations against Mr. Williams, a distant cousin, for a \$10,000.00 reward.

The court is correct in ruling that not all prior bad acts are admissible and Cole's family's dislike for him is irrelevant(L.F.784-85). However, many of Cole's prior bad acts went directly to the question of his truthfulness.

The court's finding that counsel effectively attacked Cole's credibility does not withstand scrutiny. The record shows that counsel extensively cross-examined Cole on his desire for the reward, his prior inconsistent statements (especially those from his videotaped statement), and his prior convictions(Tr.2454-2556). However, the trial court precluded counsel from addressing Cole's arrests and expectation of leniency(Tr.2538-43). Counsel did not have Cole's correction records, material counsel wanted to use for impeachment(D.L.F.189,395). Counsel wanted his mental health records to investigate impeachment, but could not get them, since the prosecutor told him not to sign releases(D.L.F.225-32,395,Tr.1630-31). Counsel did not delve into his drug and alcohol use, his mental illness, his history of testifying against others to gain leniency and benefits.

*Id.* Most importantly, the jury never heard that Cole admitted he had a caper going on when he was concocting his story against Mr. Williams. As this Court has found, “the failure to pursue a single important item of evidence may demonstrate ineffective assistance of counsel and prejudice sufficient to warrant a new trial.” *State v. Wells*, 804 S.W.2d 746, 748(Mo.banc1991).

The motion court’s ruling that Cole’s mental illness or incompetence would not have provided a viable defense(L.F.786) is flat wrong and the motion court knew it.<sup>14</sup> Mental illness is relevant both to impeach a witness and determine competence. *State v. Robinson*, 835 S.W.2d 303, 306-07(Mo.banc1992); *Newton*, *supra*; *United States v. Golyansky*, 291 F.3d 1245, 1248(10<sup>th</sup> Cir.2002); *East v. Johnson*, 123 F.3d 235, 238(5<sup>th</sup> Cir.1997); *United States v. Lindstrom*, 698 F.2d 1154, 1163-64(11<sup>th</sup> Cir.1983).

As discussed in Point I, a witness’ paranoia and schizophrenia is relevant for impeachment. *United States v. Jimenez*, 256 F.3d 330, 343-44(5<sup>th</sup> Cir.2001), Hallucinations are highly relevant to determine competency and a witness' ability to observe what happened. *Newton*, *supra* at 471; *United States v. Pryce*, 938 F.2d 1343, 1346(D.C.Cir.1991); and *East v. Johnson*, *supra* at 238. Mental illness obviously can affect a witness' memory. *State v. Pinkus*, 550 S.W.2d 829, 839-40 (Mo.App.S.D.1977).

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<sup>14</sup> See, *State v. Newton*, 925 S.W.2d 468(Mo.App.E.D.1996), discussed in Point I, *supra*.

Here, Cole saw bugs in his glass and heard voices when no one was talking to him(L.F.133-34). He likely suffered from paranoid schizophrenia(L.F.147). Counsel knew about his mental problems as Cole was in a mental hospital when they deposed him just before trial(L.F.146-47). He admitted under oath that he suffered from hallucinations and had memory lapses. *Id.* Cole's mental illness calls into question whether he could distinguish reality from his fantasies and whether he was competent. Contrary to the court's conclusion, a psychiatric expert could have assisted in challenging the witness' competence and could have testified. *Robinson, supra*, at 306.

Counsel's failure to investigate Cole's mental illness certainly warranted a hearing. *See, Sederes v. State*, 776 S.W.2d 479, 480(Mo.App.E.D.1989) (counsel's failure to investigate complaining witness' history of mental illness warrants a hearing).

### **Prejudice**

Under *Strickland*, this Court must determine whether a reasonable probability exists that had jurors heard all this impeaching evidence, the outcome would have been different. The central issue is whether the confidence in the outcome is undermined. *Kyles, supra*. When deciding if Mr. Williams established prejudice, this Court must evaluate all the evidence adduced at trial and in the postconviction action. *Wiggins v. Smith*, 123 S.Ct. 2527, 2543(2003); *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1515(2000).

Here, the jurors never knew that Cole wrote to his son about his caper he had going while jailed with Mr. Williams. The jurors never knew that he had a long history of lying to gain benefits for himself. He made a career out of informing on others to gain leniency or benefits. He had a pattern of lying. They had no clue that he was mentally ill, suffering from hallucinations and delusions. The jury could not consider his antipsychotic medications or their impact on him.

When all this evidence, that jurors never heard, is combined with the impeaching evidence at trial (Cole's admission he was testifying for the reward, his prior inconsistent statements, and his prior convictions), this Court's faith in the outcome must be shaken.

The State's case was not strong, no physical evidence connected Mr. Williams to the scene. Rather, the State's case rested squarely on Cole and Asaro's believability. Thus, it was critical for counsel to adequately investigate, impeach Cole and challenge his competency. Counsel admitted on the record that they failed to do this, because they ran out of time. The motion court had a duty to hear evidence on these claims. This Court should reverse and remand for an evidentiary hearing.

### **III. Ineffective Assistance: Failing to Investigate Laura Asaro**

The motion court clearly erred in denying, without a hearing, Mr. Williams' claims that counsel was ineffective for failing to investigate and rebut Laura Asaro's testimony, because counsel's failure denied Mr. Williams due process and effective assistance of counsel, U.S.Const.,Amends. VI and XIV; Mo.Const.,Art. I, §§10, 18(a), Rule 29.15(h), in that the motion alleged that counsel acted unreasonably in failing to:

A. interview and call witnesses, Edward Hopson and Colleen Bailey, who would have testified that Asaro admitted setting Mr. Williams up to get the \$10,000 reward, had a motive to lie as she was addicted to drugs and desperately needed crack cocaine, and had made prior false accusations against others;

B. interview and call Cynthia Asaro, Walter Hill, Theon Shear, Quilon Hill, Shenita Hill, Billy Hill, and James Hill who could have rebutted Asaro's guilt phase testimony that Mr. Williams drove his car on the date of the alleged offense and that she did not have access to the car, as the witnesses knew the car was not operational on that day, and that she had a set of keys to the car and got into the trunk after Mr. Williams was jailed;

C. test Asaro's blood, hair and fingerprints to connect her to the crime scene; and

**D. investigate and call Walter Hill and introduce his phone records to show Asaro was lying when she testified that Mr. Williams called her via a 3-way phone and threatened her; and Mr. Williams was prejudiced as this evidence would have shown that Asaro was not truthful and could not be believed and would have supported counsel's defense that Asaro was involved in the killing and was blaming it on Mr. Williams.**

The State built its case on two witnesses who had everything to gain by testifying against Mr. Williams. Defense counsel tried to show that both Cole and Asaro lied and Mr. Williams was not guilty. Mr. Williams' amended motion alleged that counsel failed to adequately investigate Asaro, failing to interview and call witnesses that could establish that she was lying and could not be believed. Counsel failed to test her hair, blood and fingerprints to connect her to the scene. They failed to produce documentary evidence showing she lied under oath. Despite these allegations, the trial court denied the claims without a hearing. The court erred. A remand is required.

**A. Edward Hopson and Colleen Bailey**

Claim (f) alleged that counsel unreasonably failed to interview and call witnesses, Edward Hopson and Colleen Bailey, who would have testified that Asaro admitted setting Mr. Williams up to get the \$10,000 reward, had a motive to

lie as she was addicted to drugs and desperately needed crack cocaine, and had made prior false accusations against others(L.F.78-79,151-57).

Hopson had known Asaro since she was eight years old(L.F.153). He knew that she was a paid informant, and witnessed her provide false information to police on other occasions(L.F.153-54). Hopson knew Asaro had sex with police officers in exchange for money(L.F.153). Prior to her testimony against Mr. Williams, police came to her house frequently(L.F.155).

Asaro told her neighbor, Colleen Bailey that she was setting up her boyfriend for the money(L.F.155). Her motivation was to get money to buy crack cocaine(L.F.155). Bailey also knew Asaro had a pattern of lying to get out of trouble, had sex with officers to get money and drugs, and was a paid informant (L.F.156).

The motion court found that Asaro's prior bad acts were irrelevant and inadmissible at trial(L.F.787). If any of the acts were admissible, the court viewed them as cumulative to evidence at trial showing she was a liar, prostitute, police informant, drug addict and someone who was setting up Mr. Williams for the reward money(L.F.787). Further, since counsel was unaware of Bailey's name, they could not be ineffective for failing to discover her(L.F.787-88). The court found this evidence would not have provided a viable defense(L.F.788), and the mere failure to impeach did not entitle Mr. Williams to relief(L.F.788). According to the court, Mr. Williams was not prejudiced by counsel's failure(L.F.788).



### **B. Mr. Williams' Car**

Claim (g) alleged counsel unreasonably failed to interview and call Cynthia Asaro, Walter Hill, Theon Shear, Quilon Hill, Shenita Hill, Billy Hill, and James Hill who could have rebutted Asaro's guilt phase testimony that Mr. Williams drove his car on the date of the alleged offense and that she did not have access to the car(L.F.79-80,157-68). These witnesses knew the car was not operational on that day, and that Asaro had a set of keys to the car and got into the trunk after Mr. Williams was jailed(L.F.162-66). Laura's mother, Cynthia, also would have revealed that Laura gave her coupons, an item found in the victim's purse(L.F.165-66). Cynthia never read any letters from Mr. Williams to her daughter, contrary Laura's trial testimony(L.F.165-66).

The motion court denied this claim, without a hearing, concluding that the testimony would have been cumulative to Jimmy Hill and Latonya Hill's testimony at trial(L.F.789-90). The court found that Quilon Hill, Shenita Hill and James Hill's testimony would not have been impeaching, since the motion did not allege that the witnesses knew the car was inoperable on August 11, 1998 (L.F.790). Finally, the court found no prejudice(L.F.791).

### **C. Asaro's Blood, Hair and Fingerprints**

Claim (i) alleged counsel was ineffective for failing to test Asaro's blood hair and fingerprints to connect her to the crime scene(L.F.82-84,173-79). Since trial counsel's theory was that Asaro participated in the murder and got the laptop

as a result, it was unreasonable not to pursue this investigation and testing (L.F.174-78).

The motion court denied this claim without a hearing, finding that the motion pled only conclusions that Asaro's hair, blood or fiber would match (L.F.792). No items had been collected from Asaro (L.F.792). The court concluded that "since there is no evidence or rational basis to believe Asaro was involved in the murder or was at the crime scene, trial counsel was not ineffective for failing to request comparison of Asaro's blood, hair, or fibers"(L.F.792). The court faulted Mr. Williams' motion for not requesting such testing(L.F.793). Finally, the court used Mr. Williams' deposition testimony that Asaro told him she obtained the lap-top computer from a prostitution customer as evidence refuting that she was at the crime scene(L.F.793).

#### **D. Three-Way Calls Were Not Possible**

Claim (h) alleged counsel's ineffectiveness in failing to investigate and call Walter Hill to show Asaro was lying when she testified in her deposition that Mr. Williams called her via a 3-way phone and threatened her during these calls (L.F.80-82,168-73). Additionally, counsel failed to introduce Mr. Hill's phone records that would have verified Asaro's allegations were not possible(L.F.168-69).

The motion court denied this claim because Asaro did not testify about the three-way phone calls at trial(L.F.791). Additionally, the State had established that Asaro was afraid to come forward because of verbal and physical threats

made by Mr. Williams shortly after the offense, during jail visits, in letters, and telephone conversations(L.F.791-92). According to the court, impeaching Asaro on this “minor point” would not have discredited her testimony or provided a viable defense(L.F.792).

### **Standard of Review**

These findings are reviewed for clear error. *See*, Point I, *supra*. To establish ineffective assistance, Mr. Williams must show that counsel's performance was deficient and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687(1984); *Williams v. Taylor*, 529 U.S. 362, 390-91(2000). The motion court clearly erred in denying these claims without a hearing.

Contrary to the court’s finding that impeaching Asaro would not have provided a viable defense(L.F.788,792), impeaching this key state witness was ineffective. *Black v. State*, S.Ct. 85535, slip op. at 8-13 (Mo.banc,Nov. 23, 2004) (counsel ineffective for failing to impeach four witnesses with prior inconsistent statements that would have showed the murder was not deliberate). *See also*, *Hadley v. Goose*, 97 F.3d 1131, 1133-36(8<sup>th</sup> Cir.1996); *Beltran v. Cockrell*, 294 F.3d. 730, 734(5<sup>th</sup> Cir.2002); and *Driscoll v. Delo*, 71 F.3d. 701,709-11(8<sup>th</sup> Cir. 1995), discussed in Point II, *supra*.

Whether Asaro was lying and setting up her boyfriend for the reward money was the central issue in the case. Thus, Hopson and Bailey’s testimony was critical impeaching evidence. Similarly, impeaching Asaro regarding Mr. Williams’ car was not some minor point. Rather, it showed that the crime could

not have happened the way she claimed. Providing evidence that Asaro had the keys to the car and unlimited access was important to establish, not only that she was lying, but that she had every opportunity to place the incriminating items there – the logical step if she were setting up her boyfriend.

The court's finding that Asaro's bad acts were not admissible to impeach her also cannot stand. Like Cole, Asaro had much in her background to give one pause in believing her testimony. She desperately needed crack cocaine to feed her addiction and would do anything for money, including lying under oath. Even though not all her prior bad acts were admissible, extrinsic evidence of her prior false allegations would have been admissible. *State v. Long*, 140 S.W.3d 27 (Mo.banc2004).

The court's finding that much of this evidence would be cumulative is erroneous. "Evidence is said to be cumulative when it relates to a matter so fully and properly proved by other testimony as to take it out of the area of serious dispute." *Black v. State*, 2004 WL 2663641, 6 (Mo.banc2004), *quoting*, *State v. Kidd*, 990 S.W.2d 175, 180(Mo.App.W.D.1999). Contrary to the Court's finding, Asaro's admission that she was setting up Mr. Williams to get the reward money, had a motive to lie, and had made prior false accusations, was not cumulative to the evidence presented at trial. Asaro's credibility was the central issue in the case. No evidence presented at trial established that Asaro admitted setting up Mr. Williams. Further, she denied that she was testifying for the reward money, but claimed that she wanted to do the right thing, especially for the victim and her

family. Counsel presented no evidence of Asaro's false allegations, so this evidence would not have been cumulative.

Similarly, the proposed 29.15 testimony, offered to establish that Mr. Williams' car was inoperable, was not cumulative to Jimmy Hill and Latonya Hill's testimony at trial. Latonya did not even testify about whether the car was drivable(Tr.2791-99). Jimmy said the car was not drivable at the time of the murder, but when he was pressed by the prosecutor, admitted that he was unsure of the time when the car was inoperable(Tr.2786). Thus, the jury was left with Asaro's word against Mr. Williams' brother's word, who by his own admission was unsure about when the car became inoperable. Jimmy's testimony did not conclusively establish this point and take it out of the area of serious dispute.

The court rejected Claim (f) in part because the motion did not allege that counsel was aware of Colleen Bailey's name(L.F.787-88). The court ignores that the motion alleged that had counsel conducted a reasonable investigation, they would have easily discovered Bailey(L.F.151). Counsel had documents providing Hopson's name as a potential witness and an interview with Hopson would have led to Asaro's neighbor Bailey(L.F.151). Both Hopson and Bailey knew that Asaro had admitted setting up her boyfriend, Mr. Williams, to get the reward money(L.F.153-56).

Counsel has a duty to conduct a reasonable investigation and follow any leads he discovers. *Wiggins v. Smith*, 539 U.S. 510, 527(2003)(counsel's failure to follow-up on leads in records ineffective); *State v. Butler*, 951 S.W.2d 600, 608

(Mo.banc1997)(counsel's failure to follow-up on leads in police report that victim's nephew as a suspect ineffective). Both *Wiggins* and *Butler* show that not all leads must come from the client, but can come from other sources. *Wiggins* put it this way:

In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.

*Wiggins v. Smith*, 539 U.S. 510, 527, 123 S.Ct. 2527, 2538(2003). Here, counsel failed to follow the leads his client gave him as well as additional witnesses stemming from those leads.

The court's finding that the motion did not adequately plead that Mr. Williams' car was inoperable on the date of the offense does not withstand scrutiny. The motion alleged that Walter Hill would have testified that "Marcellus purchased the car in mid to late July 1998 and it stopped running a few days later and it has been *inoperable since that time*"(L.F.163)(emphasis added). Witnesses James Hill, Quilon Hill and Shenita Hill, all would have testified about when the car broke down in July, 1998(L.F.163). Latonia Hill knew the car was inoperable after August 3 or 4, 1998, because she loaned Mr. Williams her car(L.F.165). Asaro's mother, Cynthia Asaro, would testify that "Marcellus' car was not operational in August 1998"(L.F.165). The motion detailed facts providing a basis

for this knowledge, as Mr. Williams and Laura Asaro were riding the bus at the time(L.F.165-66).

The motion court rejected Mr. Williams' claim that counsel was ineffective for failing to investigate and test Asaro's blood hair and fingerprints, as being conclusory and because the motion did not request the testing. However, the claim was factual, saying such testing would have incriminated Asaro and placed her at the scene. The claim warranted a hearing.

The failure to investigate and to introduce evidence that another person committed the crime in question can constitute ineffective assistance of counsel. *Henderson v. Sargent*, 926 F.2d 706, 710-11(8th Cir), *amended* 939 F.2d 586(1991). The failure to conduct appropriate scientific analysis can constitute ineffective assistance of counsel. *Moore v. State*, 827 S.W.2d 213 (Mo.banc 1992); *Wolfe v. State*, 96 S.W.3d 90, 93-95(Mo.banc2003).

In *Moore v. State*, 827 S.W.2d 213, 215-16(Mo.banc1992), counsel failed to request blood tests, readily available evidence. *Id.* Had such tests been conducted, they would have shown that Moore could not be the source of semen found on the victim's sheet. *Id.* The evidence could have exonerated Moore and created a reasonable probability of a different result. *Id.*

In *Wolfe v. State*, 96 S.W.3d 90, 93-95(Mo.banc2003), counsel failed to investigate and test physical evidence, a hair, that would have connected the accomplice Cox, not Wolfe, to the crime scene (the hair was in the car where the shooter sat, and in an ammunition box, consistent with the ammunition used in the

crime). The State's case relied on Cox. *Id.* Had counsel obtained readily available scientific testing, the results would have cast doubt on Cox's credibility. *Id.*, at 94-95. A reasonable probability existed that the outcome would have been different. *Id.*, at 95.

Like both *Moore* and *Wolfe*, here, counsel failed to investigate the physical evidence. Counsel did not consult with a scientific expert regarding Asaro's blood, fingerprints, or hair. This was unreasonable given counsel's strategy of linking Asaro to the scene and explaining how she obtained the victim's property. In his opening, counsel commented on the police's failure to take hair and fibers from Asaro(Tr.1699). Unfortunately, the defense did not take them either.

Postconviction counsel did not need to request the court order this evidence from Asaro, since she volunteered under oath to provide it to anyone who wanted it(Tr.1985). If anyone would have asked for it, she would have given it to them (Tr.1985).

The motion court gives scant consideration to the claim that Asaro lied under oath in her deposition(L.F.791-92). However, that a prosecution witness lied under oath in previous proceeding is impeaching material under *Brady*. *United States v. Cuffie*, 80 F.3d 514, 517(D.C.Cir.1996). If Asaro was willing to lie under oath about 3-way calls when it could easily be proven that such calls were impossible, she would be willing to lie at trial to convict Mr. Williams. She had much to gain, pin the blame on him, and reap a nice reward to feed her drug habit.



Finally, the motion court clearly erred in analyzing the prejudice. As with Cole, the court looked at counsel's action in each claim, rather than assessing all the impeaching evidence counsel failed to adduce combined with the testimony at trial. See, *Wiggins v. Smith*, 123 S.Ct. 2527, 2543(2003); and *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1515(2000), discussed in Point II, *supra*.

At trial, Asaro claimed that Mr. Williams told her he broke into the victim's house through the back door(Tr.1851), contrary to the crime scene evidence. Asaro asserted that Mr. Williams described Ms. Gayle as wearing a robe (Tr.1882,1937). In reality she had on a t-shirt. Asaro said that Mr. Williams washed the knife after he killed Ms. Gayle(Tr.1937). The evidence showed it was left in the body, not washed(Tr.2115). She claimed that Mr. Williams sold the computer to a man named Larry, but Glenn Roberts, not Larry, bought the computer(Tr.2001-01).

Had the jurors heard the additional impeaching evidence -- Asaro admitted that she was setting up Williams so she could get the reward money -- they would have had more doubts. Had they known that she had made prior false allegations in the past, the jurors would have had more reasons to question her truthfulness. Had jurors known that aspects of her testimony were untrue, that Mr. Williams' car was not running, Asaro had the keys to the car, and entered it freely while Mr. Williams was jailed, the jurors likely would have questioned her story. Asaro kept some of the victim's property, conflicting with the account she gave at trial. That

Asaro lied about threats Mr. Williams supposedly made in writing and during phone calls cast additional doubt about her veracity.

Connecting Asaro to the crime scene with forensic testing would have destroyed the State's case and shown that she was setting up Mr. Williams to take the fall. She was the guilty party and lied about Mr. Williams.

Given all this evidence, the court's confidence in the outcome must be undermined. These claims warrant a hearing. This Court should reverse and remand for an evidentiary hearing.

#### **IV. Discovery in A Rule 29.15 Proceeding**

**The motion court abused its discretion in overruling Mr. Williams' motion to compel production of documents, Asaro's drug treatment records, Cole and Asaro's mental health records and corrections records, and police reports, and subsequent motions to compel disclosure, because the rulings violated Mr. Williams' rights to due process, compulsory process, confrontation, to present a defense, effective assistance of counsel, freedom from cruel and unusual punishment, and a full and fair hearing, U.S.Const., Amends. VI, VIII, XIV; Mo.Const.,Art. I, §§10, 18(a), and 21, and Rules 29.15(e) and (h), 56.01 and 58.01, in that the evidence was necessary to prove Mr. Williams' claims of prosecutorial misconduct in failing to disclose impeaching material of Cole and Asaro, state misconduct in presenting false evidence at trial regarding Mr. Williams' car, and trial counsel's ineffectiveness in failing to investigate Cole and Asaro, and that another person committed the crime.**

Before trial, the State filed motions to prevent the defense from effectively impeaching Laura Asaro and Henry Cole(D.L.F.401-06,441-43). The State did not want defense counsel to be able to confront them with their drug and alcohol addiction and treatment records, or their mental illness(D.L.F.405,442). The State never disclosed these records and counsel did not get them(Tr.1630-31). Then at trial, the State questioned Asaro about her treatment, opening up the very inquiry

it claimed was foreclosed(Tr.1904,1915,1917). The defense could not adequately confront the witnesses as they had not received relevant disclosure and had not investigated the witnesses. Counsel did not have Cole and Asaro's corrections or jail records(D.L.F.395,Tr.23-24). They did not have police reports necessary to show the State's misconduct at trial in presenting false information and to show that someone else committed the crime.

Six days after being appointed, post-conviction counsel requested discovery of these items(L.F.42-48). The State did not respond, so counsel filed a motion to compel production(L.F.49-64). The court denied their request for disclosure of all items, except that it ordered the State to provide a list of Cole's convictions, evidence provided at trial and available in the trial transcript(L.F.66-68). The court told counsel to subpoena all the items(L.F.66-68). When counsel subpoenaed the items, the court granted motions to quash and denied all the motions for orders to produce these items(L.F.390,403,750-55). The motion court abused its discretion in denying discovery in this case, and must be reversed.

### **Standard of Review**

Discovery in post-conviction cases is governed by Rule 56.01. *State v. Ferguson*, 20 S.W.3d 485, 504(Mo.banc2000). Under 56.01(b)(1), a movant is entitled to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . ." *Ferguson, supra*. Even privileged material may be discoverable. Private information must be disclosed when it was necessary for the defense of the accused, for a fair

disposition of the case, to avoid the risk of false testimony, or to secure useful testimony. *See State ex rel. St. Louis County v. Block*, 622 S.W.2d 367, 370 (Mo.App.E.D.1981).

Information sought in discovery does not have to be admissible, if it is “reasonably calculated to lead to the discovery of admissible evidence.” Rule 56.01(b)(1). Trial courts are vested with broad discretion in ruling on discovery requests and the court’s rulings are reviewed for an abuse of discretion. *State ex rel. LaBarge v. Clifford*, 979 S.W.2d 206(Mo.App.E.D.1998).

Here, Mr. Williams sought discovery to establish his claims of prosecutorial misconduct for not disclosing impeaching evidence, for presenting false evidence, and his claims of ineffective assistance of counsel. Missouri is a fact-pleading state and requires specific allegations. *State v. Harris*, 870 S.W.2d 798, 815(Mo.banc1994). Postconviction counsel have a duty of diligence to investigate, plead and present all postconviction claims. *Williams v. Taylor*, 529 U.S. 420(2000). As a result, Mr. Williams was entitled to discovery to properly plead and prove his claims. Allegations in a motion are not self-proving, but required evidence in support. *Taylor v. State*, 728 S.W.2d 305 (Mo.App.W.D. 1987).

### **Drug Treatment Records**

Mr. Williams sought Asaro’s drug treatment records, necessary to establish the State’s failure to disclose impeaching evidence (Point I) and trial counsels’ failure to investigate Asaro (Point III). Before trial, the State filed a motion in

limine to preclude defense counsel from impeaching these witnesses with evidence of their mental illness and treatment(D.L.F.401-06,441-43). Then in its opening, the prosecutor told jurors that Asaro was addicted to drugs(Tr.1650). The State elicited that Asaro was addicted to crack cocaine(Tr.1904). The State asked whether her videotaped statement was accurate(Tr. 1915). Asaro maintained that the statement was not as accurate as her trial testimony(Tr. 1915). Asaro said “now I am clear - - I am in a recovery program and I can think more clear now and remember more better now.”(Tr.1915). The State asked Asaro:

Q. Are you doing crack cocaine anymore?

A. No, I have been in recovery for three months. I go to New Beginning program. I am there from 9 a.m. to 5 p.m. and I am also in drug court.

(Tr. 1917).

The State had moved to exclude this evidence as improper impeachment, and then elicited the very evidence it said was prohibited. Such conduct has routinely been condemned as manifestly unjust. *State v. Hammonds*, 651 S.W.2d 537, 538-39(Mo.App.E.D.1983); *State v. Luleff*, 729 S.W.2d 530, 535(Mo.App.E.D.1987); *State v. Weiss*, 24 S.W.3d 198, 204(Mo.App.W.D.2000).

Defense counsel was stuck with Asaro’s answers since it did not have access to her drug treatment records. Counsel had not fully investigated Asaro. The prosecutor had requested this evidence be excluded, but then raised it during his direct examination. Thus, the records were relevant to the subject matter

involved, whether the State's conduct violated Mr. Williams' rights to due process and to confrontation, and whether counsel was ineffective.

Due process requires criminal prosecutions comport with prevailing notions of fundamental fairness. *California v. Trombetta*, 467 U.S. 485(1984).

Defendants must be afforded a meaningful opportunity to present a complete defense. *Id.* The prosecution must disclose favorable evidence that is either material to guilt or punishment, including impeaching material. *Brady v.*

*Maryland*, 373 U.S. 83, 87 (1963); *United States v. Bagley*, 473 U.S. 667, 674-77 (1985). Prosecutors are responsible for disclosure of *Brady* materials, regardless of any failure by police to bring such evidence to the prosecutors' attention. *Kyles v. Whitley*, 514 U.S. 419, 437(1995). The State's failure to disclose *Brady* materials is a ground for Rule 29.15 relief. *State v. Phillips*, 940 S.W.2d 512, 516-18(Mo.banc1997); *Hayes v. State*, 711 S.W.2d 876, 879(Mo.banc1986). *See also State v. Robinson*, 835 S.W.2d 303, 306(Mo.banc1992)(disclosure of exculpatory information, including impeaching information, must be disclosed even without a request).

The right to confront one's accusers is "an essential and fundamental" tool. *Pointer v. Texas*, 380 U.S. 400, 404(1965). This right ensures defendants the opportunity to conduct *effective* cross-examination of adverse witnesses. *Kentucky v. Stincer*, 482 U.S. 730, 739(1987). A defendant may not be unduly restricted in his attempt to test the accuracy of an adverse witness' testimony. *State v. Moorehead*, 811 S.W.2d 425, 427(Mo.App.E.D.1991).

The Sixth Amendment's Compulsory Process Clause guarantees the right to the government's assistance in compelling the attendance of favorable witnesses and the right to put before a jury evidence that might influence the determination of guilt. *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987).

Mr. Williams is entitled to effective assistance of counsel under the Sixth and Fourteenth Amendments. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove he was denied this right, Mr. Williams must show that counsel's performance was deficient and prejudice resulted. *Id.*; *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). Counsel can be ineffective in failing to impeach the State's essential witnesses. *See, e.g. Black v. State*, S.Ct. 85535, slip op. at 8-13 (Mo.banc,Nov. 23, 2004); *Hadley v. Groose*, 97 F.3d 1131, 1133-36(8<sup>th</sup> Cir. 1996); *Driscoll v. Delo*, 71 F.3d. 701,709-11(8<sup>th</sup> Cir.1995), discussed in Points II and III, *supra*.

Here, all these rights were violated because Mr. Williams' counsel did not have Asaro's drug treatment records. The records would have been admissible to impeach her, since she waived any privilege to these records by testifying about her treatment on direct examination. *Brandt v. Medical Defense Associates*, 856 S.W.2d 667, 672 (Mo.banc1993). *See also, State v. Evans*, 802 S.W.2d 507 (Mo.banc1991)(defendant's girlfriend waived physician-patient privilege with respect to medical records by testifying about her treatment on direct).

The State attempted to use Asaro's drug addiction and her treatment to show she was credible, yet also sought to prevent Mr. Williams' from using



information regarding the treatment to show the jury how that drug addiction affected her credibility and bias. A patient should not be allowed to use the privilege strategically to exclude unfavorable evidence while at the same time admitting favorable evidence. *Id.*

### **Cole and Asaro's Mental Health Records**

Both Cole and Asaro had a history of mental problems. The State sought to prevent defense counsel from investigating the witnesses' mental problems (D.L.F.395). Larner told Cole not to sign releases for this information (D.L.F.395). He filed a motion to exclude this evidence at trial (D.L.F.405,442). Thus, counsel only discovered what the witnesses admitted in their depositions: that they had suffered from hallucinations and memory loss (L.F.146,160).

Mr. Williams' post-conviction counsel requested the mental health records, specifying the facilities where the witnesses were treated (L.F.44-45,52-53). Counsel also requested a court-ordered psychiatric evaluation of Cole, referenced in the prosecutor's trial file (L.F.62,371). Alternative to disclosure, counsel requested the court conduct an *in camera* review, the remedy provided in *State v. Newton*, 925 S.W.2d 468 (Mo.App.E.D.1996) (L.F.470). Yet Judge O'Brien denied all requests for discovery and refused to review any of the material *in camera* (L.F.390,403,750-55). The motion court abused its discretion.

Although Missouri recognizes a physician-patient privilege, §491.060, Missouri courts have recognized that this privilege "may give way to some extent where there is a *stronger countervailing societal interest.*" *State ex rel. Dixon*

*Oaks Health Center, Inc. v. Long*, 929 S.W.2d 226, 230(Mo.App.S.D. 1996). *See*, *State v. Robinson*, 835 S.W.2d 303, 306(Mo.banc1992) (the duty for the State to disclose exculpatory evidence required the disclosure of the psychiatric record of the victim, *including previous false reports*); and *Newton, supra* at 471(generalized interest in confidentiality must yield to a defendant's constitutional rights in criminal trial).

Cole and Asaro's statutory privilege must yield to Mr. Williams' constitutional rights to confrontation and to compulsory process. *See, Davis v. Alaska*, 415 U.S. 308, 319 (1974) (Alaska's legitimate interest in preserving the anonymity of its juvenile offenders had to give way to the defendant's paramount right to probe into the influence of possible *bias* in the testimony of a *crucial identification witness*). Similarly, Missouri's interest in preserving the confidentiality of the mental health records must yield to Mr. Williams' paramount right to test the credibility of these witnesses crucial testimony in this death penalty case.

Mr. Williams should have been permitted to confront Cole and Asaro with their psychiatric records. The records were subject to disclosure. *Robinson* and *Newton*.

Here, the trial court abused its discretion. Cole and Asaro's records likely would have shed light on "whether the testimony was based on historical facts ... or whether it was the product of psychotic hallucinations." *United States v. Lindstrom*, 698 F.2d 1154, 1168(11<sup>th</sup> Cir.1983). Both witnesses had admitted in

their deposition testimony that they had suffered from hallucinations and memory loss. Cole had a history of psychiatric disorders that manifested themselves in manipulative and destructive conduct. These psychiatric defects were relevant to the witnesses' credibility, and materially affected the accuracy of testimony.

### **Corrections Records**

Postconviction counsel also requested Cole and Asaro's penitentiary and jail records(L.F.44-45). Cole had a long criminal history and had been incarcerated in Missouri, Michigan, Pennsylvania, and the Federal Bureau of Prisons(L.F.45). Postconviction counsel learned from their investigation that Cole had made prior false allegations and had testified against others while incarcerated(L.F.126-27,129,130-32,135,137). Thus, his records were "reasonably calculated to lead to the discovery of admissible evidence." Rule 56.01. They were necessary to show counsel's ineffectiveness in failing to investigate Cole and the State's failure to disclose impeaching information.

Similarly, Asaro had a criminal history. She had pled guilty to an attempt to possess a controlled substance(Tr.1900) and had been arrested for prostitution (Tr.1901,1909,1921,1957), for possession of drug paraphernalia, and forgery (Tr.1955). She was jailed on one of the prostitution charges(Tr.1957-58).

Mr. Williams was entitled to the correction records of the State's witnesses. *Carriger v. Stewart*, 132 F.3d 463, 479-82(9<sup>th</sup> Cir.1997). Carriger's postconviction counsel obtained the State's primary witness, Dunbar's corrections file. *Id.* 470-71. The file revealed that state authorities knew

Dunbar to be a liar. *Id.* Using the corrections' file, Carriger's postconviction counsel located prison superintendents, guards and fellow prisoners, who testified about his history of lying and reputation for manipulation and deceit. *Id.* The file revealed a pattern of lying to police and shifting blame to others. *Id.* He had made false accusations against the police. *Id.* When he got in trouble, he had a pattern of seeking deals with the police. *Id.* The Court found that the corrections records should have been disclosed before trial. *Id.*, at 480.

The prosecution had a duty to disclose the corrections file, even if they did not have personal possession of the materials. *Id.* at 478-79. The prosecutor's actual awareness of exculpatory evidence in the government's hands is not determinative of the prosecution's obligation to disclose. *Id.*, citing *Kyles*, at 435-40. Rather, the prosecution has a duty to learn of any exculpatory evidence known to others acting on the government's behalf, including prison officials. *Carriger, supra.* The prosecution is in a unique position to obtain information known to other agents of the government, and it is not excused from disclosing what it does not know but could have learned. *Id.* "The disclosure obligation exists, after all, not to police the good faith of prosecutors, but to ensure the accuracy and fairness of trials by requiring the adversarial testing of all available evidence bearing on guilt or innocence." *Id.* citing *Kyles, supra* at 438-42; *Brady*, 373 U.S. at 87.

Like *Carriger*, here the State relied on witnesses who were being rewarded for their testimony. Cole admitted money was his motivation for coming forward

and testifying(Tr.2389,2428,2445,2454-59). Asaro wanted money too(Tr.1953). Asaro could have been prosecuted for concealing an offense, §575.020, and tampering with physical evidence, §575.100. She admitted accepting benefits and consideration, money from the sale of the computer, for drugs and agreed to stay quiet(Tr.1844,1887,1946). She helped dispose of physical evidence(Tr.1844-45). Postconviction witnesses would have established that she took the contents of the victim's purse and gave them to her mother(L.F.166).

Both these witnesses had a history of lying and cooperating with the police to receive leniency. *See* Points II and III, *supra*.

Since the State was willing to use unsavory witnesses, the State had a duty to obtain their correction records and disclose them to the defense. Trial counsel also should have obtained this impeaching material.

### **Police Reports**

Postconviction counsel requested disclosure of police reports from the Pagedale Police Department regarding the murder of Debra McClain that occurred on July 18, 1998, less than a month before Ms. Gayle's murder(L.F.44). Counsel also requested the reports of the search of Mr. Williams' car while it was parked at 4940 Emerson at his grandfather's residence(L.F.44). Both these reports were reasonably calculated to lead to the discovery of admissible evidence," Rule 56.01, and should have been disclosed.

### **McClain Murder**

In Mr. Williams *pro se* motion, he alleged that counsel was ineffective for failing to investigate the actual perpetrator of the crime(L.F.29). Before trial, the State filed motions to preclude any reference to other suspects(D.L.F.401-03,416-17). Postconviction counsel argued that the police reports were relevant to investigate other suspects(H.Tr.33). The McClain murder occurred about a month before the charged offense and authorities recognized similarities in the cases. Dr. Mary Case, the medical examiner thought they could be linked(H.Tr.33). Both victims were slim, had brown hair, and were in their early forties(H.Tr.27-28). The crimes were similar. The attacker had stabbed each victim over 20 times, with a knife from the home, and then left the knife in the body(H.Tr.28). The wounds were similar, located to the head and upper body(H.Tr.28). One investigator thought the killings were the work of a serial killer(H.Tr.28). The motion court found this insufficient to support disclosure and denied the request (H.Tr.28-29).

The motion court abused its discretion in not allowing discovery necessary to prove that the two crimes were connected and Mr. Williams was innocent. Under the ruling of *Herrera v. Collins*, 506 U.S. 390(1993), Mr. Williams should raise his claims of actual innocence at the earliest opportunity. A criminal defendant is entitled to discovery of exculpatory information after conviction. *Toney v. Gammon*, 79 F.3d 693, 700(8<sup>th</sup> Cir.1996)(habeas petitioner granted access to State's evidence to conduct DNA testing).

Mr. Williams has maintained his innocence and claimed counsel was ineffective in failing to investigate his innocence and find the actual perpetrators. Postconviction counsel could not plead the claim with specificity and prove the claim without discovery into other suspects. If the motion court had concerns about the confidentiality of police reports, it could have reviewed the records *in camera* to determine whether it contained relevant information or information that would likely lead to admissible evidence. Instead, the court denied all discovery, foreclosing counsel's attempts to prove Mr. Williams' innocence.

### **Search of Mr. Williams Car**

Mr. Williams asked for all police reports documenting all the police searches search of his car(L.F.44). These reports were necessary to prove the claims in his *pro se* 29.15 motion, that the prosecutor knowingly presented false and misleading evidence at trial in violation of the 14<sup>th</sup> Amendment due process clause(L.F.27-28). Police officers searched Mr. William's 1984 Buick LaSabre parked at his grandfather's house and watched as Mr. Williams' cousin, Joseph Hill knocked the lock out of the trunk. *Id.* The officers then seized a letter addressed to state witness, Laura Asaro. *Id.* This search showed that Asaro falsely testified that Mr. Williams' uncles gave her access to the trunk and she needed to use a screwdriver to gain access to the trunk. *Id.* The search also showed that the prosecutor misled the jury in cross-examining defense witness Latonya Hill, suggesting that the lock was rusted out and had not been knocked out during the search. *Id.*

This claim was not self-proving, but required evidence to support it. The police reports were essential to prove the prosecutorial misconduct. Mr. Williams should have had an opportunity to pursue these claims. “It has long been established that the prosecution’s ‘deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice.’” *Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256, 1274(2004), quoting *Giglio v. United States*, 405 U.S. 150, 153(1972). The state may not stand silently and do nothing to correct its witness’ false testimony. *Napue v. Illinois*, 360 U.S. 264, 269-70(1959).

The motion court abused its discretion in denying Mr. Williams discovery. This Court should remand with instructions to the court to order disclosure of this material so that it can be presented at an evidentiary hearing.



**V. Appellate Counsel's Failure to Brief Error in Denying a Continuance**

**The motion court clearly erred in denying an evidentiary hearing on Mr. Williams' claim that he was denied effective assistance of appellate counsel, due process, and freedom from cruel and unusual punishments, U.S. Const., Amend. VI, VIII, XIV, in that appellate counsel unreasonably failed to raise the trial court's error in overruling the continuance motion:**

- 1) the claim had significant merit since trial counsel lacked time to investigate and prepare;**
- 2) the law supported the claim;**
- 3) the claim was preserved; and**
- 4) appellate counsel pursued weaker issues, including five plain error claims.**

**Mr. Williams was prejudiced because, had the claim been raised, a reasonable probability exists that this Court would have granted a new trial, and with a continuance, counsel could have adequately prepared for guilt and penalty phase, creating a reasonable probability of a different outcome.**

On May 7, 2001, approximately a month before trial, counsel requested a continuance(D.L.F.394-98). Counsel needed time to prepare for both guilt and penalty phases. *Id.* The State gave late notice of non-statutory aggravating circumstances and witnesses it intended to call(D.L.F.395). The State gave notice of its intent to rely on the jail assault on April, 5, 2001(D.L.F.395), although the

alleged offense occurred more than a year earlier(D.L.F.395). Prosecutors waited nearly a month later before disclosing witness Matthieu Hose(D.L.F.395). The State waited until May 1, 2001, a month before trial, to disclose its intention to introduce evidence of other bad acts, a burglary with which Mr. Williams had never been charged or convicted(D.L.F.395). This offense had occurred four years earlier, in 1997. *Id.* Yet, shortly before trial, the State disclosed four new witnesses from that incident that counsel needed to interview and investigate (D.L.F.395).

Counsel could not obtain their own client's records from the Department of Corrections(D.L.F.395), even though the prosecuting attorney was allowed to check them out from the Department of Corrections(H.Tr. 97). Similarly, counsel had been unable to get Henry Cole's prison records from Missouri, Pennsylvania, Michigan and the Federal Bureau of Prisons(D.L.F.395). Rather than assisting counsel in obtaining the impeaching material, the State discouraged witness-Cole from signing releases at his deposition. *Id.* The State also failed to provide correspondence between Mr. Williams and Cole, a map of the crime scene prepared by Cole for the police, telephone records of calls Cole supposedly made, and payment records for the money police paid Cole for his cooperation (D.L.F.396).

Counsel also needed time to complete forensic testing of shoe prints, hair, fiber and serological evidence obtained at the scene(D.L.F.396). The State had not

provided raw data of its testing, necessary for an independent review. *Id.* The State did not provide supplemental reports of fingerprint testing. *Id.*

Counsel informed the court why a month before trial was not sufficient to prepare. Mr. Green was representing Kenneth Baumruk in another death penalty case(D.L.F.397). That trial was scheduled to begin May 7, 2001, leaving counsel with no time to devote to Mr. Williams' case. Counsel told the court they could not be effective and prepared without a continuance(D.L.F.397). The court denied the motion, saying the parties could make a record on May 25, 2001(D.L.F.400).

On May 25, 2001, counsel filed a supplemental verified motion for continuance(D.L.F.457-61). Again, counsel identified the State's conduct that made it impossible for counsel to be prepared. Surprises and late disclosure continued.

On May 11, 2001, defense counsel finally received fingerprint reports and discovered that the State had destroyed fingerprints taken from the scene(D.L.F.458). State witnesses were not cooperating. The State instructed Veronica Gayle not to speak with the defense, resulting in counsel having to depose her(D.L.F.458). The victim of an alleged burglary in Kansas City could not appear for his deposition scheduled for May 24, 2001(D.L.F.458). On May 18, 2001, counsel learned that police and the victim's family had a formal, written reward agreement, but had not provided a copy to counsel(D.L.F.458). The prosecutor provided notice of a statement of Mr. Williams where he allegedly admitted stabbing a woman over forty times(D.L.F.458).

Counsel complained that they could not obtain Mr. Williams' correction records(D.L.F.458-59). They needed these records to rebut potential aggravation and to establish mitigating evidence, Mr. Williams' ability to adjust well to incarceration(D.L.F.459). The records were essential to evaluate and offer opinions as to the character and mental makeup of Mr. Williams(D.L.F.459). The State never provided a copy of the records they obtained before the records were lost, saying they intended to use the records for impeachment(Tr.106).

Counsel's forensic testing of the crime scene was incomplete(D.L.F.459). This testing could exonerate Mr. Williams and provide mitigation. *Id.* Further, the State had filed a motion to exclude other suspects unless evidence directly connected them to the crime(Tr.127-28). Thus, it was incumbent on counsel to do the testing. *Id.*

The State rationalized its late disclosure saying that since Mr. Williams' counsel had failed to request aggravating circumstances, the State did not have to disclose them(Tr.133-34). As for the late disclosure of statements by Mr. Williams, the State said it would not use them unless Mr. Williams testified (Tr.100). The court denied the request for a continuance(Tr.87-134,D.L.F.462).

Defense counsel included this claim in their motion for new trial (D.L.F.543). Counsel admitted that due to the denial of the continuance, they could not effectively cross-examine State witnesses and offer evidence in both guilty and penalty phases(D.L.F.543). As a result, Mr. Williams was denied effective assistance of counsel, due process, a fair trial, a fair and impartial jury

and fair and reliable sentencing as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and under the Missouri Constitution(D.L.F.543).

On appeal, Mr. Williams’ counsel did not raise the trial court’s denial of defense counsel’s request for a continuance. Instead, counsel raised plain error in allowing the State to use a three-door hallway analogy in voir dire that had been approved by this Court and federal courts(App.Br.65-69). *State v. Tokar*, 918 S.W.2d 753(Mo.banc1996); *State v. Ervin*, 979 S.W.2d 149, 162-63 (Mo.banc 1998); *Roberts v. Bowersox*, 61 F.Supp.2d 896(E.D.Mo.1999); and *Tokar v. Bowersox*, 1 F.Supp.2d 986(E.D.Mo.1999).

Appellate counsel also raised plain error in the court’s submitting an instruction not in conformity with MAI-CR3d 302.01, since it omitted three paragraphs on jurors’ duties when taking notes(App.Br.101-06). The record showed, however, that the trial court had read the proper instruction to the jury during the trial(Supp.Tr.2-4). Not surprisingly, this Court did not find plain error. *State v. Williams*, 97 S.W.3d 462, 472(Mo.banc2003).

In Point VII, appellate counsel again alleged plain error, suggesting the trial court should have *sua sponte* limited the State’s presentation of victim impact testimony, without any objection from the defense(App.Br.107-15). The claim had no merit since “previous cases [had] upheld victim impact evidence nearly identical to that presented in this case.” *Id.* at 470, *citing State v. Storey*, 40 S.W.3d 898, 909(Mo.banc2001).

Another plain error claim, Point VIII, challenged the aggravating circumstance instruction(App.Br.116-33). This Court rejected the claim finding no error, much less plain error. *Id.* at 473-74.

Finally, Point X raised a plain error closing argument point(App.Br.141-46). Appellate counsel again advocated that the trial court should have *sua sponte* intervened during guilt phase closing when the prosecutor argued why Asaro did not come forward – she was scared of Mr. Williams, since he tried to choke her (Tr.3013). Counsel argued this was improper personalization(App.Br. at 142-44). This Court again denied the claim finding no error or prejudice. *Id.* at 474. Thus, of the ten points raised on appeal, half were for plain error.

Mr. Williams alleged appellate counsel was ineffective in failing to raise the trial court's error in not granting a continuance(L.F.92-93,261-67). The motion court denied the claim without a hearing, ruling that such a claim is reviewed for an abuse of discretion, a continuance is not required if counsel had ample time to prepare, and the trial transcript shows that trial counsel did an effective job and was well prepared for trial(L.F.811-12).

### **Standard of Review**

These findings are reviewed for clear error. *See*, Point I, *supra*. Mr. Williams is entitled to effective assistance on his first appeal of right. *Evitts v. Lucey*, 469 U.S. 387(1985); *State v. Sumlin*, 820 S.W.2d 487, 490(Mo.banc1991). The standard for effectiveness of appellate counsel is the same as that for evaluating trial counsel's performance: Mr. Williams must show that counsel's

performance was deficient and the performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668(1984). See, *Smith v. Robbins*, 528 U.S. 259, 285(2000) (proper standard for evaluating petitioner's claim of ineffective assistance for not filing a merits brief is *Strickland*). The Court must determine whether counsel ignored issues clearly stronger than those presented. *Id.* at 288, citing, *Gray v. Greer*, 800 F.2d. 644, 646(7thCir.1986). *Strickland* does not require the issue be a "dead-bang winner." *Neill v. Gibson*, 278 F.3d 1044, 1057(10<sup>th</sup>Cir.2001). That requirement would be more onerous than *Strickland's* reasonable probability standard. *Id.*

The "failure to raise a claim that has significant merit raises an inference that counsel performed beneath professional standards." *Sumlin, supra* at 490. The presumption of reasonableness afforded an appellate attorney can be overcome if he neglected to raise a significant and obvious issue while pursuing substantially weaker ones. *Bloomer v. United States*, 162 F.3d.187, 193(2nd. Cir.1998).

Furthermore, in death penalty cases, counsel should not winnow claims. Death penalty appeals are different than non-capital appeals. "Although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence *mandates careful scrutiny in the review of every colorable claim of error.*" *Zant v. Stephens*, 462 U.S. 862, 885(1983)(emphasis added). "Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Burger v.*

*Kemp*, 483 U.S. 776, 785(1987). The American Bar Association advocates raising “all arguably meritorious issues.” American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, §11.9.2D (1989). These Guidelines form the standard of practice in death penalty cases and are constitutionally-required. *Wiggins v. Smith*, 123 S.Ct. 2527, 2537(2003). See also ABA Guidelines, February 2003, Guideline 10.15.1.C. The Commentary regarding direct appellate counsel’s duty reveals the danger of “winnowing” claims:

“Winnowing” issues in a capital appeal can have fatal consequences. Issues abandoned by counsel in one case, pursued by different counsel in another case and ultimately successful, cannot necessarily be reclaimed later. When a client will be killed if the case is lost, counsel should not let any possible ground for relief go unexplored or unexploited.

*Id.* The Commentary cites *Smith v. Murray*, 477 U.S. 527(1986). There, direct appellate counsel failed to assert that the testimony of a psychiatrist who examined the defendant, without warning him that the interview could be used against him, violated the defendant’s Fifth Amendment rights. *Id.* The omitted claim was found meritorious in *Estelle v. Smith*, 451 U.S. 454(1981), but Smith was barred from raising it in federal habeas, because of direct appellate counsel’s error. Smith was subsequently executed. Commentary, at n.341.



Appellate counsel was ineffective. The continuance claim had significant merit. Counsel did not have adequate time to prepare due to the State's late and nondisclosure and due to counsel's responsibilities in another death penalty case.

Case law supported granting a continuance. In *State v. Whitfield*, 837 S.W.2d 503, 507(Mo.banc1992), this Court found an abuse of discretion in failing to grant a continuance as a result of the State's discovery violation. Similarly, in *State v. McIntosh*, 673 S.W.2d 53, 54-55(Mo.App.W.D.1984), the trial court abused its discretion when it failed to grant a continuance necessary for the defense to prepare for trial. *See also, State v. Perkins*, 710 S.W.2d 889, 893 (Mo.App.E.D.1986) (court's failing to grant a continuance was an abuse of discretion).

Since the continuance claim was preserved, counsel's failure to raise it on direct appeal was unreasonable, especially since counsel pursued much weaker, unpreserved claims. Without a hearing, the motion court could not determine why appellate counsel failed to raise this issue and whether counsel's conduct was reasonable. The Court's suggestion that, since the claim would have been reviewed for abuse of discretion, it would have been losing, is contrary to *Whitfield*, *McIntosh* and *Perkins*. An abuse of discretion standard is easier to meet than the plain error standard counsel pursued in five of ten claims on appeal.

The continuance claim had merit and was supported by the record. Thus, the motion court erred in not granting a hearing on the claim of appellate counsel's ineffectiveness. A remand should result.

**VI. Counsel Ineffective For Failing to Offer Instruction That Evidence of Attempted Escape Could Only Be Used to Show Consciousness of Guilt**

**The motion court clearly erred in denying, without a hearing, Mr. Williams' claim that counsel was ineffective for failing to offer an instruction that evidence of attempted escape and jail assault was admitted for a limited purpose, to show Mr. Williams consciousness of guilt, because counsel's failure denied Mr. Williams due process and effective assistance of counsel, U.S.Const.,Amends. VI and XIV; Mo.Const.,Art. I, §§10, 18(a), Rule 29.15(h), in that the motion alleged that counsel acted unreasonably in failing to submit the limiting instruction, counsel's failure was not strategic as his motion for new trial alleged error in the trial court's failure to give the instruction, and Mr. Williams was prejudiced as the State's case was not strong, but relied on two paid informants who had been impeached, and without a limiting instruction, the jury likely considered the evidence of Mr. Williams escape attempt where he allegedly assaulted a guard and expressed his desire to kill a guard as evidence that he was violent and the type of person who would have committed the charged offense.**

At trial, the State introduced evidence of Mr. Williams' escape attempt over defense counsel's objection(Tr.1679-84). The trial court ruled that the evidence of Mr. Williams attempted escape and assault of a jail guard was admissible to show his consciousness of guilt, citing *State v. Guinan*, 506 S.W.2d 490

(Mo.App.E.D.1974)(Tr.1682-83). Accordingly, at the end of his opening statement, the prosecutor outlined the escape attempt in detail(Tr.1686-89).

The State called two witnesses to testify about the escape, an inmate, Mathieu Hose(Tr.2615-72) and a correctional officer from the St. Louis Jail, Captain Terry Schiller(Tr.2673-97). Hose said he overheard Mr. Williams, Quintin Davis, and John Duncan plan their escape from the jail(Tr.2618). Mr. Williams supposedly discussed various ways to escape and contemplated tying up the guards, hitting them, or killing them(Tr.2618-19).<sup>15</sup>

On January 28, 2000, the inmates put their plan into action(Tr.2621-23). Mr. Williams struck a guard over the head with an iron bar from the weight room (Tr.2621-24,2637,2682,Exs.247,248,249). The officer fell to the floor with his head busted open(Tr.2625). Captain Schiller told the jury the officer was bleeding like a “stuck pig”(Tr.2674). When Schiller came to the aid of his fellow officer, Mr. Williams went after him too(Tr.2629-31,2674,2688-89,Ex.242). They struggled for the bar(Tr.2630-31, 2674-75).

Meanwhile, Duncan picked up a table and beat it against a window, trying to escape(Tr.2628,2675,Exs.243,244). The inmates did not escape(Tr.2659).

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<sup>15</sup> The jury heard Hose say Mr. Williams wanted to kill the guard(Tr.2619).

However, since the State had not disclosed the statement allegedly made by Mr. Williams, the trial court sustained counsel’s objection to the testimony(Tr.2620-21).

Even though counsel objected to this evidence(Tr.1679-84,2612-14), they did not request a limiting instruction. The State argued the assault in guilt phase:

Whacked that man right over the head. Did he care if he killed that man? I think that Officer Harrison was damn lucky he's alive, being hit over the head with this. Whack, and then swung the bar. Damn lucky, don't you think? But he didn't care if he killed that officer, as long as he got out of jail. Right after he gets indicted and arraigned for murder.

(Tr.3057).

Defense counsel claimed the trial court erred in admitting this evidence in their motion for new trial(D.L.F.548-49). Counsel also claimed error in the trial court failing "to sua sponte instruct the jury as to the consideration of evidence proffered by the state of the alleged escape attempt and assault"(L.F.549).

According to counsel, this error denied Mr. Williams his "rights to effective assistance of counsel, due process, a fair trial, a fair and impartial jury and fair and reliable sentencing" under the federal and Missouri constitutions(L.F.549).

Mr. Williams' amended motion claimed that counsel was ineffective in failing to request a limiting instruction, telling the jury that this evidence could only be considered to show Mr. Williams' consciousness of guilt, and not for any other purpose(L.F.87,201-04). The motion court denied the claim, without a hearing, ruling that the decision to request such an instruction is a matter of trial

strategy, such an instruction might have highlighted the escape/assault evidence, and Mr. Williams had not shown prejudice(L.F.799-800).

### **Standard of Review**

These findings are reviewed for clear error. *See*, Point I, *supra*.

To establish ineffective assistance, Mr. Williams must show that counsel's performance was deficient and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687(1984); *Williams v. Taylor*, 529 U.S. 362, 390-91(2000). Counsel can be ineffective for failing to object to an improper instruction or submit proper instructions. *Deck v. State*, 68 S.W.3d 418(Mo.banc2002); *Comm. v. Billa*, 555 A.2d 835, 842-43(Pa.1989).

In *Billa*, the defendant was convicted of a brutal murder and sentenced to death. He escaped from a pre-release center, and went to 16 year old Maria Rodriquez' house. *Id.* at 837. He had been trying to establish a relationship with her. *Id.* Later, the victim was found dead in the basement of her house. *Id.* Billa had beaten her in the head with an aluminum baseball bat, busting open her skull. *Id.* He had stabbed her numerous times, penetrating her lung and striking her neck. *Id.* The knife had broken off and protruded from her neck. *Id.* She obviously struggled for her life, leaving defensive wounds on her hands and arms. *Id.*

Investigators found evidence of sexual assault, her shirt was raised up exposing her breasts and she had semen in her vagina from a Type A secreter. *Id.*

Billa stole the jewelry she was wearing, including the pendant with the inscription, “Sweet 16” that she had received for her birthday the day before the attack. *Id.*

Billa returned to the center and gave his cellmate the victim’s jewelry. *Id.* at 838. Police found the victim’s blood type on Billa’s clothing, hidden at his mother’s house. *Id.* Billa confessed to police that he had killed the victim, but claimed that it was an accident. *Id.* He admitted that he wanted to stab her when he struck her in the neck. *Id.* He also admitted stealing her jewelry. *Id.*

The trial court admitted evidence of an offense that occurred two months earlier. *Id.* Billa had raped and assaulted a 20 year old woman, stole her jewelry and strangled her, leaving her unconscious. *Id.* She survived the attack. *Id.* This evidence was admitted, over vigorous objection, to show motive, to rebut Billa’s claim of accident and to establish modus operandi. *Id.* at 839. However, defense counsel did not request a limiting instruction, which the trial court would have been required to submit if requested by either party. *Id.* at 842.

On appeal, the Pennsylvania Supreme Court ruled that Billa’s counsel was ineffective for failing to request the limiting instruction. *Id.* at 842-43. While the evidence was admissible for the purpose of showing intent and motive, and to rebut accident, it was not admissible for other purposes. *Id.* The other crimes evidence was highly inflammatory and the evidence was not a mere fleeting or vague reference to Billa’s criminal record. *Id.* at 843. While an instruction may not always be effective, “it is normally the best available reconciliation of the

respective interests.” *Id.* Thus, counsel’s failure to request the instruction was prejudicial. *Id.*

Like counsel in *Billa*, here too counsel objected to the other crimes evidence being admitted(Tr.1679-84,2612-14). Counsel also failed to request a limiting instruction that would have told the jury that the evidence could be introduced only to show consciousness of guilt, not to show that Mr. Williams is violent and the type of person who would commit the charged offense. Had counsel requested an instruction, the trial court would have been required to submit it.

MAI-CR3d: 310.12 provides:

If you find and believe from the evidence that the defendant (was involved in) (was convicted of) (was found guilty of) (pled guilty to) (pled nolo contendere to) (an offense) (offenses) other than the one for which he is now on trial (and other than the offense mentioned in Instruction No. \_\_\_\_), you may consider that evidence on the issue of (identification) (motive) (intent) (absence of mistake or accident) (presence of a common scheme or plan) (*[Specify other purpose for which the evidence was received as substantive evidence of guilt.]*) of the defendant (and you may also consider such evidence for the purpose of deciding the believability of the defendant and the weight to be given to his testimony). (You may not consider such evidence for any other purpose.)

This instruction must be given upon the request of either party. Notes on Use 2.

The motion court speculated that trial counsel might have failed to submit this instruction as a matter of trial strategy(L.F.799-800). Motion courts cannot speculate that a decision was based on trial strategy without first holding a hearing. *See, e.g. State v. Blue*, 811 S.W.2d 405, 410(Mo.App.E.D.1991) (no basis for determining counsel's failure to call a witness, absent a hearing); *State v. Talbert*, 800 S.W.2d 748, 749(Mo.App.E.D.1990) (failure to call endorsed witness could not be considered "strategic" absent a hearing); *Fingers v. State*, 680 S.W.2d 377, 378(Mo.App.S.D.1984) (finding that failure to impeach witness was strategic improper without a hearing); and *Chambers v. State*, 781 S.W.2d 116, 117(Mo.App.E.D.1989) (questioning of witness could not be considered trial strategy without a hearing).

Furthermore, here the record refutes any finding of trial strategy. In their motion for new trial, counsel argued that the trial court should have *sua sponte* submitted a limiting instruction to minimize the prejudice from this violent other crime evidence(D.L.F.549). Counsel's own pleading shows that they believed such an instruction would have been helpful, but simply failed to submit it as required under the rules.

Mr. Williams was prejudiced, just like the defendant in *Billa*. Here, the State's case against Mr. Williams was much weaker than in *Billa*. Mr. Williams had not confessed. No forensic evidence, like the victim's blood, connected him to the scene. While he and Laura Asaro had some of the victim's property shortly



after the offense, his defense was that Asaro had obtained it. Both Asaro and Cole had every motive to lie to obtain thousands of dollars to reward their testimony. They both had credibility problems. Thus, the violent assault and escape evidence likely affected the jury's assessment of Mr. Williams. It portrayed him as violent, wanting to kill a guard and willing to stop at nothing to escape responsibility for his actions. Given this highly inflammatory evidence, counsel should have tried to limit the impact of the evidence in anyway possible. A limiting instruction would have reduced the prejudice.

Given these facts and law, the motion court clearly erred in failing to grant a hearing on this claim. This Court should reverse and remand for an evidentiary hearing.

## **VII. Mitigation**

**The motion court clearly erred in denying, without a hearing, Mr. Williams' claim that trial counsel was ineffective for failing to investigate and psychological testimony to explain the aggravating circumstances and failing to investigate and present a complete social history because counsel's failure denied Mr. Williams due process, effective assistance of counsel, and freedom from cruel and unusual punishment, U.S.Const.,Amends. VI, VIII, and XIV; Mo.Const.,Art. I, §§10, 18(a), and 21, Rule 29.15(h), in that the motion alleged facts, not conclusions, that entitled him to relief; specifically, that counsel failed to investigate, consult with and present psychological testimony of an expert such as Dr. Cross or Dr. Cunningham, to explain the aggravators of Mr. Williams' prior criminal history; and failed to investigate Mr. Williams' family background through witnesses, Jimmy Williams, Latonia Hill, Walter Hill, Ella Williams Alexander, Patricia Larue, and Mr. Williams, who could have testified that Mr. Williams' mother resented him as she accidentally became pregnant with him, his father abandoned him, he suffered physical and sexual abuse as a child, he was exposed to violence, drugs and alcohol at a young age, his family used violence to deal with conflict, the family condoned criminal behavior, including substance abuse, and his turbulent family history resulted in multiple moves and shifting to different schools, never allowing Mr. Williams to have stability and to adjust to his environment.**

**Had jurors heard all this evidence there is a reasonable probability they would have imposed a life sentence.**

At the penalty phase of trial, the State presented evidence of Mr. Williams' prior criminal history. Witnesses testified about a doughnut shop robbery (Tr.3107-3120,3122-30,3132-40), a Burger King robbery(Tr.3143-67), and a residential burglary in Kansas City(Tr.3184-87,3188-92). A correctional officer recounted Mr. Williams' verbal threat to him while he was in jail(Tr.3168-72). The State also introduced certified copies of Mr. Williams' convictions(Tr.3167-3193-3200; Exs.174,174(a),228-232).

The defense's primary theory was residual doubt(Tr.3103-06,3489-3506). Counsel presented family members to suggest that Mr. Williams was a good role model for his children(Tr.3312-13,3340-41,3344,3353,3359,3367,3375,3380-81,3382-84,3401-09,3418-25,3426-33)). He encouraged his son and stepdaughter to work hard, stay in school, and make good grades(Tr.3359,3375,3380-81,3384,3401,3408,3421-22,3430). He also helped with their discipline and had a positive effect on them. *Id.*

The State mocked the idea that Mr. Williams had been a good father, given his prior criminal history(Tr.3482-84,3486). He sired a child, but had not been a father(Tr.3507). Rather, the state argued that he spent his time hurting and victimizing innocent people(Tr.3507).

The jury deliberated less than two hours and sentenced Mr. Williams to death(Tr.3517-18).

Mr. Williams claimed that counsel was ineffective in failing to investigate, consult, and present psychological testimony to explain Mr. Williams' prior criminal history(L.F.88-89,210-29); and failing to adequately investigate his background, as they did not conduct a complete social history(L.F.90-91,229-50). The claims were specific, listing what witnesses counsel should have interviewed, that they were available to testify and what their testimony would have been. *Id.*

### **Psychological Expert**

Mr. Williams' amended motion detailed the psychological testimony of a qualified expert such as Dr. Cross(L.F.213-27). Such an expert would have investigated and considered Mr. Williams' background and discovered that he grew up in a violent household(L.F.213). His family moved often, so he was shuffled to various schools(L.F.213). School records reflected that Mr. Williams' borderline intelligence, with a full scale IQ of 80(L.F.213). School was difficult (L.F.213-14). He failed nine classes in ninth grade(L.F.214). Not surprisingly, he had emotional and behavior problems(L.F.214).

Dr. Cross identified eight risk factors he discovered in his evaluation of Mr. Williams. First, was his relationship with his parents(L.F.214-16). His mother viewed her pregnancy of Mr. Williams as a mistake, the result of a one-night stand (L.F.214). She did not show her son affection, concern or care(L.F.215-16). Mr.

Williams' father abandoned him(L.F.215). He saw his father only three times in his entire life and at the first meeting the father beat him(L.F.215).

Secondly, an uncle and aunt sexually abused Mr. Williams when he was only 8 or 9 years old(L.F.216). Dr. Cross would have explained the third risk factor, family conflicts. Mr. Williams grew up in a violent household, where his grandfather beat his grandmother in front of the children(L.F.216-17). His mother, stepfather and other paramours beat Mr. Williams and his brothers (L.F.216-17). They stripped him naked and beat him with tree branches and belts (L.F.217-18). As a result he could not sleep(L.F. 218). He had nightmares (L.F.218). With no safe haven, he thought of suicide and turned to drugs to cope (L.F.218).

Dr. Cross also could have discussed the extreme poverty Mr. Williams had to endure(L.F.219). At times, 15-17 family members lived in a small space (L.F.219). The neighborhood had high unemployment, crime and drugs(L.F.219). Mr. Williams saw his uncles use drugs and commit crimes(L.F.219).

Mr. Williams had a fifth psychological risk factor -- alienation and rebelliousness(L.F.219-20). Dr. Cross would have explained that all of Mr. Williams' crimes for help were met with beatings(L.F.220).

Additionally, the family encouraged delinquent and violent behavior, encouraging stealing, fights and violence(L.F.220).

Mr. Williams' academic failure placed him at risk(L.F.221). He dropped out of school in the 10th grade(L.F.221).

Finally, Mr. Williams' addiction to drugs and criminal history placed him at risk(L.F.221). He committed crimes to obtain drugs, as he had been taught (L.F.224).

The result of his turbulent childhood was mental and emotional problems (L.F.224-26). As a teenager, Mr. Williams thought of suicide(L.F.225). He suffered from adolescent depression but received no treatment(L.F.225). The physical and sexual trauma caused PTSD(L.F.225-26). His verbal and performance IQ testing differed by 17 points (106/89)(L.F.225). Dr. Cross concluded that Mr. Williams suffered from significant mental illness (depression, PTSD and drug dependence) that impaired his ability to conform his conduct to the requirements of law(L.F.226). These mental illnesses explained and mitigated his prior criminal activity.

### **Turbulent Childhood – Complete Social History**

Mr. Williams' claim that trial counsel failed to investigate all relevant mitigating evidence was also specific, listing six witnesses, Mr. Williams' brother, Jimmy, his counsel, Latonia, his grandfather, mother, aunt and himself(L.F.233-247). These witnesses would have revealed that a pit bull attacked Mr. Williams, he fell from a second floor balcony and was shot in the face with a BB gun (L.F.235-36,241,246). They also remembered a family home filled with violence and sexual abuse(L.F.237,239,244-45,247). Mr. Williams' grandma died in 1987, devastating him(L.F.236,242).

School officials tried to intervene, referring Mr. Williams to a psychiatrist in the 3rd grade(L.F.246). Teachers called his mother, but she never dealt with his problems(L.F.246). Rather, the family exposed him to criminal activity and drugs(L.F.242,243,244-45,247,248).

The motion court denied these claims, without an evidentiary hearing, ruling that Mr. Williams' turbulent childhood filled with abuse would have cast him as "violent, aggressive and angry"(L.F.801). The court speculated that trial counsel's strategy was to focus on his loving relationships with family members, to portray Mr. Williams' redeeming qualities of having come from a "decent family" and to show jurors he was not the bad person the State alleged(L.F.801-02). Since trial counsel's theory was residual doubt, any explanation of Mr. Williams' troubled childhood would have been tantamount to a concession of guilt, according to the court (L.F.802). The court concluded that Mr. Williams was not prejudiced by counsel's failure(L.F.802-03).

### **Standard of Review**

The court's findings are reviewed for clear error. *See* Point I, *supra*. To establish ineffective assistance, Mr. Williams must show that his counsel's performance was deficient and that the performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668(1984); *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct.1495, 1511-12(2000). The Sixth Amendment requires counsel to "discover *all reasonably available* mitigating evidence . . ." *Wiggins v. Smith*, 123

S.Ct. 2527, 2537(2003)(emphasis in original). *Hutchison v. State*, S.Ct. No. 85548, slip op. at 13 (Mo.banc, Dec. 7, 2004).

Here, Mr. Williams alleged that counsel unreasonably failed to investigate available mitigating evidence. This claim was not refuted by the record, but supported by it. At trial, counsel presented no evidence of Mr. Williams' turbulent family history, filled with violence, physical and sexual abuse, neglect and indifference. Furthermore, counsel informed the court that they had not adequately prepared and needed more time to investigate mitigating circumstances (D.L.F.394-98,458-59,543).

The motion court's speculation about trial counsel's strategy is improper. Motion courts cannot speculate that a decision was based on trial strategy without first holding a hearing. *See, e.g. State v. Blue*, 811 S.W.2d 405, 410 (Mo.App. E.D.1991); *Fingers v. State*, 680 S.W.2d 377, 378 (Mo.App.S.D.1984).

At a hearing, counsel would have testified that he wanted to know everything about his client before deciding his penalty phase strategy(L.F.831-32). Had he had time to investigate, he would have presented Dr. Cross' testimony to explain Mr. Williams' prior criminal history(L.F.832). Since the jury already heard about Mr. Williams' prior criminal history, counsel needed to present the mitigation from Mr. Williams' family and a qualified expert to mitigate the aggravators(L.F.832-33).

The motion court's findings of no prejudice also cannot withstand scrutiny. To prove prejudice, Williams must show a "reasonable probability that, but for



counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Wiggins, supra* at 2542. When deciding if Mr. Williams established prejudice, this Court must "evaluate the totality of the evidence - - 'both that adduced at trial, *and the evidence adduced in the habeas proceeding[s]*.'" *Id.* at 2543, quoting *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. at 1515(emphasis in opinion).

Had the motion court applied the appropriate stand it would have found prejudice. Mr. Williams' troubled childhood is mitigating evidence that must be considered by a jury. *Wiggins* and *Hutchison, supra*. The jury had already found Mr. Williams guilty, thus it was incumbent on counsel to provide reasons for the jury to spare his life. Counsel believed Dr. Cross' testimony provided that compelling mitigation that could have saved Mr. Williams' life(L.F.833).

This Court should give Mr. Williams the opportunity to establish counsel's ineffectiveness at a hearing. A remand is required.

### **VIII. Aggravators Must Be Pled in Indictment**

**The motion court clearly erred denying the claim, without a hearing, that the indictment charged Mr. Williams with unaggravated first degree murder and that trial counsel were ineffective for failing to object to the indictment because Mr. Williams was denied his rights to due process, a jury trial, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S.Const.Amends. VI, VIII, XIV, in that the indictment and substitute information failed to plead any aggravating circumstances, thereby charging Mr. Williams with unaggravated first degree murder, authorizing the punishment of life without probation or parole. Reasonably competent trial counsel would have raised this jurisdictional defect and Mr. Williams was prejudiced because he would have been sentenced to the maximum of life in prison.**

Mr. Williams raised the constitutional violations resulting from the State's failure to plead aggravators in the indictment or substitute information, and trial counsel's failure to object to this jurisdictional defect(L.F.93-94,276-80). The motion court denied this claim without a hearing, relying on this Court's decisions in *State v. Gilbert*, 103 S.W.3d 743, 747(Mo.banc2003); *State v. Tisius*, 92 S.W.3d 751, 766-67(Mo.banc2002); *State v. Cole*, 71 S.W.3d 163, 171 (Mo.banc2002)(L.F.813). Mr. Williams asks that these decisions be reconsidered in light of *Blakely v. Washington*, 124 S.Ct. 2531 (2004).

### **Standard of Review**

Review is for clear error. See Point I, *supra*. To establish ineffectiveness, Mr. Williams must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687(1984).

"[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be *charged in an indictment*, submitted to a jury, and proven beyond a reasonable doubt." *Jones v. United States*, 526 U.S.227, 243 n.6(1999) (emphasis added). The Court applied this rule to the states through the Fourteenth Amendment. *Apprendi v. New Jersey*, 530 U.S. 466, 476(2000). This rule applies to eligibility factors or aggravators in state capital prosecutions. *Ring v. Arizona*, 536 U.S. 584, 600, 609 (2002).

Aggravating facts must be found by a jury beyond a reasonable doubt and thus, are elements of a greater offense. See, e.g., *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111(2003); *Harris v. United States*, 536 U.S. 545, 564(2002); *Ring v. Arizona*, 536 U.S. at 609. Accordingly, the aggravators must be pled in the document charging capital or aggravated murder. "An indictment must set forth each element of the crime that it charges." *Almendarez-Torres v. United States*, 523 U.S. 224, 228(1998). "[A] conviction upon a charge not made or upon a

charge not tried constitutes a denial of due process.” *Jackson v. Virginia*, 443 U.S. 307, 314(1979).

Thus, in *Blakely v. Washington*, 124 S.Ct. at 2538, the Court held the state trial judge's sentencing Blakely to more than three years above the 53-month statutory maximum of the standard range for his offense, on basis of the judge's finding that Blakely acted with deliberate cruelty, violated his Sixth Amendment right to trial by jury. In so ruling, the Court concluded that “‘every fact which is legally essential to the punishment’ *must be charged in the indictment* and proved to a jury.” *Id.* at 2537, n. 5, quoting, 1 J. Bishop, *Criminal Procedure*, ch. 6, pp. 50-56 (2d ed.1872)(emphasis added). The dissenters noted that “under the majority's approach, any fact that increases the upper bound on a judge's sentencing discretion is an element of the offense. Thus, facts that historically have been taken into account by sentencing judges to assess a sentence within a broad range--such as drug quantity, role in the offense, risk of bodily harm--*all must now be charged in an indictment* and submitted to a jury.” *Blakely v. Washington*, 124 S.Ct. at 2546(O'Connor, J., dissenting), citing *In re Winship*, 397 U.S. 358(1970)(emphasis added).

Under *Ring*, *Apprendi*, *Jones*, and *Blakely*, the combined effect of §§565.020 and 565.030.4 is to create, *de facto*, two kinds of first degree murder in Missouri: 1) *unaggravated* first degree murder, for which the elements are set out in §565.020.1 and which does not require proof of any statutory aggravating circumstances; and 2) the greater offense of *aggravated* first degree murder. In

Missouri, to prosecute a defendant for *aggravated* first degree murder, the charging document must plead both the elements of the lesser offense of *unaggravated* first degree murder, and the statutory aggravators necessary to establish the defendant's death eligibility.

The State did not plead any statutory aggravating circumstances – or any of the facts required by §565.030.4 in the indictments charging Mr. Williams with first degree murder or the substitute information(D.L.F.21-23,93-95,105-07). The state charged Mr. Williams with the lesser offense of *unaggravated* first degree murder and that is the “greatest” offense of which he could have been properly convicted.

The Due Process Clause of the Fourteenth Amendment requires that a state consistently follow the procedure elected for prosecuting criminal charges. *Evitts v. Lucey*, 469 U.S. 387, 401(1985) (when a State acts in a field where its action has significant discretionary elements, it must act in accord with the dictates of the Due Process Clause).

In Missouri, “no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information... .” Mo.Const.,Art.I, §17. An indictment or information must “contain all of the elements of the offense and clearly apprise the defendant of the facts constituting the offense.” *State v. Barnes*, 942 S.W.2d 362, 367(Mo.banc1997). “[A] person cannot be convicted of a crime with which the person was not charged unless it is a lesser

included offense of a charged offense.” *State v. Parkhurst*, 845 S.W.2d 31, 35 (Mo.banc1992).

Thus, in *State v. Nolan*, 418 S.W.2d 51(Mo.1967), this Court held that Nolan could not be convicted of aggravated robbery, when the aggravating facts, use of the dangerous and deadly weapon was not included in the charging document. “The sentence here, being based upon a finding of the jury of an aggravated fact not charged in the information, is illegal” and “[t]he trial court was without power or jurisdiction to impose that sentence.” *Id.* at 54. The Fourteenth Amendment’s Due Process Clause affords the same protection to defendants charged with murder as those charged with robbery.

This Court should find that, although the trial court had jurisdiction over Mr. Williams on the charges of *unaggravated* first degree murder, it exceeded its jurisdiction and authority in sentencing Mr. Williams to death. Counsel was ineffective in failing to object to this jurisdictional defect. This Court must vacate Mr. Williams’ death sentence and resentence him to life without parole. Alternatively, this Court should remand for an evidentiary hearing.

### **IX. Appellate Counsel's Failure to Brief The Exclusion of Mitigation**

The motion court clearly erred in denying an evidentiary hearing on Mr. Williams' claim that he was denied effective assistance of appellate counsel, due process, and freedom from cruel and unusual punishments, U.S. Const., Amend. V, VI, VIII, XIV, in that appellate counsel unreasonably failed to raise the trial court's error in excluding Dr. Cunningham's testimony regarding the impact Mr. Williams' execution would have on his children since:

- 1) the claim had significant merit since any evidence reflecting on Mr. Williams' character was relevant mitigation;
- 2) the law, particularly *Lockett* and *Penry*, supported the claim;
- 3) the claim was preserved; and
- 4) appellate counsel pursued weaker issues, including five plain error claims.

Mr. Williams was prejudiced because, had the claim been raised, a reasonable probability exists that this Court would have granted a new penalty phase, and with the additional mitigation, there is a reasonably likelihood that the jury would have sentenced Mr. Williams to life.

During trial, defense counsel proffered a psychologist, Dr. Cunningham, who would have testified about the impact Mr. Williams' execution would have on his children(Tr.3385-95). The trial court ruled that this evidence was

inadmissible(Tr.3395). On appeal, Mr. Williams' counsel did not raise the error in excluding this evidence(App.Br.-S.Ct. No. 83934).

Mr. Williams' amended motion claimed appellate counsel was ineffective for failing to raise this claim(L.F.93,267-76). The motion court denied this claim, without a hearing, ruling that the court did not err in excluding this evidence at trial (L.F.812-13). The court found that this impact evidence did not relate to Mr. Williams' character, record, or circumstances of the case (L.F.812-13).

### **Standard of Review**

As discussed in Point I, *supra*, review is for clear error. As outlined in Point V, Mr. Williams is entitled to effective assistance appellate counsel. *Evitts v. Lucey*, 469 U.S. 387(1985); *State v. Sumlin*, 820 S.W.2d 487,490(Mo.banc 1991). To prove ineffectiveness, Mr. Williams must show that counsel's performance was deficient and the performance prejudiced his case. *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

The motion court should have granted a hearing on appellate counsel's ineffectiveness. The exclusion of relevant mitigating evidence is constitutional error requiring a reversal and new penalty phase. *Lockett v. Ohio*, 438 U.S. 586, 604(1978) (death penalty schemes must allow consideration "as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"); *Penry v. Lynaugh*, 492 U.S. 302(1989) (death sentence vacated because trial court's instructions did not allow jury to consider defendant's mental



retardation), *Tennard v. Dretke*, 124 S.Ct. 2562(2004) (evidence of impaired intellectual functioning is inherently mitigating at penalty phase of capital case, regardless of whether defendant has established nexus between his mental capacity and crime); and *Smith v. Texas*, 543 U.S. \_\_\_, 125 S.Ct. 400(2004) (evidence of capital murder defendant's troubled childhood, his IQ of 78, and his participation in special education classes was relevant mitigation, and Eighth Amendment required jury be capable of giving effect to that evidence).

The impact of an execution on the defendant's family is relevant mitigating evidence. *State v. Stevens*, 879 P.2d 162, 167-68(Or.1994).<sup>16</sup> In *Stevens*, the trial court excluded the defendant's wife's testimony about the anticipated negative effect of the execution on his daughter. *Id.* On review, the court found the exclusion of this evidence reversible error. *Id.* The evidence establishes the defendant's character. *Id.* at 168. The court ruled:

A rational juror could infer from the witness's testimony that she believed that her daughter would be affected adversely by defendant's execution because of something positive about his relationship with his daughter and because of something positive about defendant's character or background.

*Stevens*, 879 P.2d at 168.

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<sup>16</sup> *Stevens* decided this issue based on state law, but the Court's analysis tracks the United States Supreme Court's jurisprudence on mitigating evidence.

Similarly, California has allowed evidence, argument and instructions that tell the jury to consider such family impact evidence. *People v. Fierro*, 821 P.2d 1302, 1337-38(Cal.1991).

Impact evidence should be admitted for at least two additional reasons. Juries hear victim impact evidence, *Payne v. Tennessee*, 501 U.S. 808(1991). Thus, it is only fair that they should hear the defendant family impact evidence as well. King, R. and Norgard, K., “What About Our Families? Using the Impact on Death Row Defendants’ Family Members as a Mitigating Factor in Death Penalty Sentencing Hearings,” 26 *Fla St.U.L Rev.* 1119, 1161-65 (Summer, 1999).

Secondly, this type of evidence is admissible in non-capital felony sentencing hearings. *Id.* at 1152-54.<sup>17</sup> Missouri’s statute is not as specific, but allows for consideration of “the history and character of the defendant” in

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<sup>17</sup> See e.g., *People v. Young*, 619 N.E.2d 851, 855(Ill.App.Ct.1993)(Illinois statute allows consideration of whether imprisonment would entail excessive hardship to dependents); *Battle v. State*, 688 N.E.2d 1230, 1237(Ind.1997) (dependents are a mitigating factor under Indiana law allowing courts to consider whether imprisonment would result in undue hardship to dependents); *State v. Johnson*, 570 A.2d 395, 400(N.J.1990) (courts allowed to consider imprisonment would entail excessive hardship to dependents); *State v. Teague*, 300 S.E.2d 7 (N.C.App.1983) (whether defendant has a supportive and stable family is mitigating factor).

considering probation eligibility. §559.012. The impact imprisonment would have on a defendant's family is admissible under this broad language. Accordingly, it should be admissible in capital sentencing proceedings where all relevant mitigation must be admitted and there is a need for heightened reliability. *Woodson v. North Carolina*, 428 U.S. 280, 305(1976).

Since the mitigation claim was preserved, counsel's failure to raise it on direct appeal was unreasonable, especially since counsel pursued much weaker, unpreserved claims. *See*, Point V, *supra* where Mr. Williams discusses counsel's litigating five unpreserved points, asking for plain error review.

Counsel's failure prejudiced Mr. Williams. Like *Stevens*, here, jurors had to decide whether, considering all the evidence, there was anything in Mr. Williams' character or background that prevented them from believing that the death penalty was the appropriate punishment. When mitigating evidence is excluded, rarely can a court say that the evidence could not have affected the jury's "reasoned moral response" in determining whether a defendant should have received a death sentence. *Stevens, supra*, 879 P.2d at 168.

In Missouri, the evaluation of the aggravating and the mitigating evidence "is more complicated than a determination of which side proves the most statutory factors beyond a reasonable doubt." *State v. Storey*, 986 S.W.2d 462, 464(Mo.banc1999). The jury is never required to give death. *Id.* Rather, the jury has discretion to assess life imprisonment even if mitigating factors do not

outweigh aggravating factors. *Id.*, citing *State v. Brooks*, 960 S.W.2d 479, 497 (Mo.banc1997); §565.030.4(4).

Accordingly, the motion court should have granted an evidentiary hearing to determine appellate counsel's ineffectiveness. This Court should reverse and remand for an evidentiary hearing.

## **X. Lethal Injection Is Cruel and Unusual Punishment**

**The motion court clearly erred in denying a hearing on the claim that lethal injection is unconstitutional, as applied in Missouri, because that ruling denied Mr. Williams his rights to due process and to be free from cruel and unusual punishment, U.S.Const.Amends. VIII and XIV, and Rule 29.15(h), in that the motion alleged facts, not conclusions, that entitled him to relief; specifically, that Missouri's method of execution is flawed in that it causes unnecessary pain as evidenced by 12 other executions that encountered problems and resulted in prolonged and unnecessary pain and the problems will likely reoccur since the Missouri statute confers unlimited discretion to the Department of Corrections and the procedures and protocols do not include safeguards regarding the manner in which executions should occur, fail to establish minimum qualifications and expertise for personnel conducting executions, and do not provide criteria and standards for the lethal injection procedures, but use drugs that allow unnecessary pain and suffering; the allegations were not refuted by the record; and Mr. Williams was prejudiced since these problems will likely reoccur.**

Mr. Williams alleged that Missouri's use of lethal injection is unconstitutional, violating the prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution (L.F. 94,280-90). The motion alleged specific facts of twelve other executions

where the prisoners encountered problems that resulted in prolonged and unnecessary pain(L.F.281-86). The motion showed that the problems will likely reoccur since the statute provides unlimited discretion to the Department of Corrections and Missouri's protocol fails to include safeguards regarding the manner in which executions should occur, has no minimum qualifications for personnel conducting executions, contains no criteria or standards for the lethal injection procedures, and allows drugs that allow unnecessary pain and suffering (L.F.288-90).

The motion court denied the claim without an evidentiary hearing, ruling that the claim must be raised on direct appeal(L.F.814).

### **Standard of Review**

This Court reviews for clear error. *See*, Point I, *supra*.

The court's conclusion that this claim must be presented on direct appeal is clearly erroneous. *State v. Jones*, 979 S.W.2d 171(Mo.banc1998), cited by the motion court, involved a constitutional challenge to the death penalty statute, not a claim regarding the method of execution. This Court has ruled that challenges to the method of execution can be raised in post-conviction proceedings if it is properly pled. *Morrow*, 21 S.W.3d at 828. To be entitled to an evidentiary hearing, a movant must allege facts that tend to show that there is a problem of administration of the death penalty by lethal injection that is likely to occur again in Missouri. *Id*.

Mr. Williams' claim pled such facts. He outlined in great detail the

problems with the administration of lethal injection(L.F.281-86). Moreover, the motion identified why these problems are likely to reoccur. Dr. Brunner from Northwestern University Medical School reviewed Missouri's protocol<sup>18</sup> (L.F.288). Missouri's procedures do not provide adequate safeguards(L.F.288). The protocol provides no guidance or standards for procedures, but allow drugs that produce unnecessary pain and suffering(L.F.289-90).

Missouri uses the method of lethal injection, poisoning the prisoner with a lethal combination of three chemical substances: sodium pentothal, pancuronium bromide (pavulon), and potassium chloride (KCl). Lethal Injection Manual, *supra*.

The American Veterinary Medicine Association (AVMA) condemns the use of neuromuscular blocking agents such as pavulon in the euthanasia of animals. Since 1981, many states, including Missouri, have made the use of pancuronium bromide on domestic animals illegal.<sup>19</sup> Utilizing methods or

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<sup>18</sup> Missouri's lethal injection manual can be found at:

<http://www.angelfire.com/fl3/starke/injection.html>

<sup>19</sup> Tex. Health & Safety Code, §821.052(a); Fla.Stat. §§828.058 and 828.065 (1984); Ga.CodeAnn. §4-11-5.1 (1990); Me.Rev.Stat.Ann., Tit.17 §1044 (1987); Md.Code.Ann.,Criminal Law, §10-611(2002); Mass.Gen.Laws §140:151A(1985); N.J.S.A. 4:22- 1.3(1987); N.Y. Agric. & Mkts §374(1987); Okla.Stat.,Tit.4,§501 (1981); Tenn.CodeAnn. §44-17-303(2001). Other states have simply banned such

chemicals to execute human beings which have been banned for use in euthanizing animals violates contemporary standards of decency. *Cf. Atkins v. Virginia*, 536 U.S. 304, 315(2002) (executing those with mental retardation violates contemporary standards reflected in state statutes barring same).

Under the Eighth Amendment, a punishment “must not involve the unnecessary and wanton infliction of pain.” *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)(opinion of Stewart, Powell, and Stevens, J.J.) *See, also, Louisiana v. Resweber*, 329 U.S. 459, 463(1947) (“The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence”). A chosen method of execution must minimize the risk of unnecessary pain, violence, and mutilation. *Glass v. Louisiana*, 471 U.S. 1080, 1086 (1985) (Brennan, J. dissenting from certiorari denied). A punishment violates the Eighth Amendment if it causes torture or lingering death. *Id.* at 1086, citing *In re Kemmler*, 136 U.S. 436, 447(1890). Lethal injection and related procedures can violate the Eighth Amendment prohibition against cruel and unusual punishment. *Nelson v. Campbell*, 124 S.Ct. 2117(2004).

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practices. *See* 510 Ill.Comp.Stat.,ch.70,§2.09; Kan.Stat.Ann.§47-1718(a); La.Rev. Stat.Ann.§3:2465; Missouri,2CSR 30- 9.020(F)(5); R.I.Gen.Laws,§4-1-34; Conn. Gen.Stat.§ 22-344a; Del.CodeAnn.,Tit.3,§8001; Ky.Rev.Stat.Ann.§321.181(17) and 201KAR16:090,§5(1); S.C.CodeAnn.§47-3-420.



The motion court clearly erred in rejecting this claim without an evidentiary hearing. This Court should remand for a hearing or alternatively, impose life without parole.

## **XI. Hearing on Trial Counsel's Conflict of Interest**

**The motion court clearly erred in denying a hearing on the claim that trial counsel had a conflict of interest and the trial court failed to conduct an inquiry into the conflict, because that ruling denied Mr. Williams his rights to due process and to effective assistance of counsel, U.S.Const.Amends. VI and XIV, and Rule 29.15(h), in that the motion alleged facts, not conclusions, that entitled him to relief; specifically, that Mr. Williams had filed a motion before trial informing the trial court of counsel's conflict of interest, the trial court conducted no inquiry about the factual basis for this motion, and Mr. Williams was prejudiced as he was forced to proceed to trial with counsel whom he did not trust, could not communicate, and had not fully investigated his case.**

Mr. Williams amended motion alleged that he was denied effective assistance of counsel and due process because his trial counsel had a conflict of interest that he tried to present to the trial court, but the court failed to conduct any inquiry into the factual allegations supporting his claim(L.F.86-87,196-201). The motion court denied this claim without a hearing, never addressing the court's error in failing to conduct a hearing on the actual conflict of interest(L.F.796-99). The court found the claim was conclusory and denied relief. *Id.* The record shows otherwise.

### **Standard of Review**

This Court reviews for clear error. *See* Point I, *supra*. The Sixth Amendment requires effective and conflict-free counsel. *Mickens v. Taylor*, 535 U.S. 162, 166(2002); *Strickland v. Washington*, 466 U.S. 668, 685-686(1984). If counsel has an actual conflict of interest, a conflict of interest that adversely affects counsel's performance, then prejudice is presumed. *Mickens*, 535 U.S. at 172; *Cuyler v. Sullivan*, 446 U.S. 335(1980). A "conflict of interest" can mean a division of loyalties that affected counsel's performance. *Mickens*, *supra*, discussing *Holloway v. Arkansas*, 435 U.S. 475, 482(1978) and *Glasser v. United States*, 315 U.S. 60(1942).

When a defendant raises a claim of actual conflict of interest, "it is the court's responsibility to inquire into the matter." *State v. Owsley*, 959 S.W.2d 789, 793(Mo.banc1997), citing *United States v. Blum*, 65 F.3d 1436, 1441(8<sup>th</sup> Cir.1995). See also, *Smith v. Lockhart*, 923 F.2d 1314, 1320(8<sup>th</sup> Cir.1991). In *Owsely*, the defendant alleged that he had "irreconcilable differences" with his counsel. The trial court properly allowed Owsley to fully air his concerns, took exemplary steps to alleviate the stress by appointing co-counsel, and assured adequate communication with counsel. *Id.* Thus, the trial court properly inquired into the matter and exercised its discretion in resolving it. *Id.*

Here, in contrast, the trial court failed to exercise any discretion and made no inquiry about the conflict before trial. Adding insult to injury, the court then

denied Mr. Williams a hearing on the claim in his 29.15 action, further eliminating the opportunity to fully air his claims. The motion court clearly erred.

Mr. Williams cited facts alleging his trial counsel had a conflict of interest and that the trial court failed to conduct any inquiry into the conflict when raised before trial(L.F.86-87,196-201). Counsel had failed to interview specific witnesses provided by Mr. Williams who would have shown that state witness Henry Cole was lying(L.F.196-98). He had advised counsel numerous times that he wanted them to interview Cole's son, Johnifer, his sister, Dexine, his niece, Twanna, and his nephew, Ronnie(L.F.197). As a result of counsel's failure to investigate, the attorney-client relationship had dissolved(L.F.198). Mr. Williams could not trust his attorneys as he felt they were pursuing their own interests rather than his(Tr.198-99).

This claim was not refuted by the record, but supported by it. Before trial, Mr. Williams filed a *pro se* motion for actual conflict of interest raising this claim (D.L.F.444). The trial court conducted no inquiry into the factual basis for this claim, contrary to well-established case law. *Owsley, Blum and Smith, supra*.

Mr. Williams was prejudiced, since he could have established an adverse effect on counsel's performance. Counsel admitted they were unprepared and had failed to investigate the case(D.L.F.394-98,457-61,400,462). Had the motion court granted an evidentiary hearing, Mr. Williams' counsel would have testified that he wanted to know all he could about Henry Cole, but he ran out of time and was unable to interview Cole's family members(L.F. 828-29). Counsel would

have called these witnesses at trial to impeach Cole, to show his motive to testify was for money, and to show his mental illness that made his testimony unreliable (L.F.829). Counsel had no strategic reason for failing to contact Cole's family (L.F.830). Further, had the trial court conducted a hearing on the conflict of interest before trial, counsel would have supported Mr. Williams' claims that counsel had not adequately investigated the case(L.F.830). Because of late disclosure by the State, counsel's other duties in another death penalty case, Kenneth Baumruk, and the recent information he received about Cole, counsel could not complete the necessary investigation(L.F.830).

Given this record, the motion court clearly erred in denying a hearing on this claim. This Court should reverse and remand for an evidentiary hearing.

## **XII. Mr. Williams' Right to Testify in Penalty Phase**

**The motion court clearly erred in denying Mr. Williams' claim that he was denied his right to testify and counsel were ineffective in failing to advise him of this right because this denied him his rights to due process, compulsory process, the right to testify, effective assistance of counsel, and freedom from cruel and unusual punishment, U.S.Const.Amends. V, VI, VIII, and XIV, in that counsel unreasonably failed to tell Mr. Williams that he had a right to testify in penalty phase and Mr. Williams was prejudiced because his testimony could have explained that he obtained the victim's husband's laptop computer from Asaro, contradicting both Asaro and Cole's testimony, thereby undermining the confidence in the outcome.**

The motion court granted an evidentiary hearing on a single issue, whether Mr. Williams was denied his right to testify in penalty phase and whether counsel was ineffective for failing to inform him of that right(L.F.91-92,250-55,483). Both trial attorneys forthrightly admitted that they could not remember advising Mr. Williams about his right to testify in penalty phase(H.Tr.46,53-54,66,67-68,83,94,102,11,116,120-22,126,131).

Mr. Williams did not know he had a right to testify in penalty phase (L.F.598). His attorneys never discussed this right with him(L.F.598). Had he known, he would have testified(L.F.599,603). In mid-August, 1998, Asaro got off a bus with a laptop computer(L.F.669-70). Asaro claimed that she got it from one

of her tricks(L.F.671). She wanted to sell it(L.F.670-71). Mr. Williams gave her his brother's pager number and asked people in the neighborhood if they were interested(L.F.671). Glen Roberts gave \$150.00 for the computer(L.F.672-73). Mr. Williams maintained his innocence, but his heart still went out to Felicia Gayle and her family(L.F.679). He was deeply sorry for their loss(L.F.679).

The motion court denied this claim, ruling that while neither attorney remembered discussing with Mr. Williams whether he should testify in penalty phase, Mr. Green would have suggested that Mr. Williams testify if counsel wanted him to and if Mr. Williams had asked to testify, he would have allowed him to do so(L.F.803-05). The court also found Mr. Williams' amended motion pled contradictory facts, that counsel had advised him not to testify in penalty phase and that counsel had failed to advise him of his right(L.F.805-06). The court concluded that Mr. Williams knew he had a right to testify and counsel did nothing to prevent him from exercising this right(L.F.805-06).

The court found that Mr. Williams' proposed testimony, that Asaro had the laptop immediately following the crime, was "not believable" and was cumulative to trial testimony of Tramel Harris(L.F.806-07;Tr.2804-06). The court did not believe the testimony that Asaro said she got the laptop from one of her "tricks." (L.F.807), or any of Mr. William's other testimony(L.F.807-08). Finally, the court found the testimony would not have been helpful, as it contained inconsistencies, and included admissions of other crimes(L.F.808-10).

### **Standard of Review**

This Court reviews for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo.banc2000); Rule 29.15.

### **Constitutional Right to Testify**

A criminal defendant has a constitutional right to testify on his own behalf. *Rock v. Arkansas*, 483 U.S. 44, 49-53, 62(1987) (holding a *per se* rule excluding hypnotically refreshed testimony impermissibly infringed on a defendant's constitutional right to testify). The right is rooted in the Fourteenth Amendment's guarantee of due process, the compulsory process of the Sixth Amendment, and the corollary to the Fifth Amendment right against self-incrimination. *Id.* at 483 U.S. at 53, n. 10. This right is personal to the defendant, thus he has the "ultimate authority" to decide whether to testify on his own behalf. *Jones v. Barnes*, 463 U.S. 745, 751(1983). Courts will not presume a waiver of such an important right from a silent record. *Boykin v. Alabama*, 395 U.S. 238, 243(1969). Rather, waiver or invocation belongs solely to the defendant. *El-Tabech v. Hopkins*, 997 F.2d 386, 388(8thCir.1993); *United States v. Bernloehr*, 833 F.2d 749, 751(8th Cir.1987); *Howard v. State*, 59 S.W.3d 586, 589(Mo.App.E.D.2001).

### **Ineffective Assistance of Counsel**

Even though the right to testify belongs to the client, his counsel carries primary responsibility for notifying the defendant of that right. *United States v. Teague*, 953 F.2d 1525, 1533(11thCir.1992). The very "purpose of the constitutional guaranty of a right to counsel is to protect an accused from



conviction resulting from his own ignorance of his legal and constitutional rights." *Foster v. Delo*, 39 F.3d 873, 884(8thCir.1994), quoting, *Johnson v. Zerbst*, 304 U.S. 458, 465(1938). Courts finding a denial of a defendant's right to testify almost invariably involve ineffective assistance of counsel. *Bernloehr*, 833 F.2d at 752 n. 2. *See also, Payne v. State*, 21 S.W.3d 843, 845(Mo.App.E.D.1999) (remand on issue of counsel's ineffectiveness in advising defendant not to testify).

To establish ineffective assistance, Mr. Williams must show that counsel's performance was deficient and that it prejudiced his case. *Strickland v. Washington*, 466 U.S. 668(1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). Mr. Williams must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id.*; *State v. Butler*, 951 S.W.2d 600, 608(Mo.banc1997). A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

Here, Mr. Williams has met his burden. Both trial counsel admitted that they could not remember telling Mr. Williams he had a right to testify in penalty phase; they did not discuss it(H.Tr.46,53-54,66,67-68,83,94,102,11,116,120-22,126,131). The motion court ignored this, and focused instead on whether Mr. Williams asked to testify or whether counsel would have allowed him to testify had he asked to do so(L.F.803-05).

The motion court also rejected the claim because Mr. Williams' amended motion pled contradictory facts(L.F.805-06). However, Rule 55.10 allows such alternative pleading. Additionally, allegations in a Rule 29.15 motion are not self-

proving but require evidence in support. *Taylor v. State*, 728 S.W.2d 305 (Mo.App.W.D.1987). Accordingly, the motion court clearly erred in denying this claim based on counsel's alternative and contradictory pleadings.

The motion court's conclusion that Mr. Williams was not prejudiced since his testimony was not believable is clearly erroneous too. The court found Mr. Williams unbelievable when he stated Asaro had obtained the laptop shortly after the crime and said she got it from one of her tricks(L.F.807). However, "it is not for the court to decide whom the jury would believe when faced with the contradiction." *United States v. Lore*, 26 F.Supp.2d 729, 740(N.J.D.C.1998). A defendant should have the opportunity to present his plea in mitigation. *Id.* "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Green v. United States*, 365 U.S. 301, 304(1961). "The most important witness for the defense in many criminal cases is the defendant himself." *Rock v. Arkansas*, 483 U.S. at 52.

The court's finding that Mr. Williams' testimony would not be believed because it contained inconsistencies and admissions of other crimes also cannot stand. The jury, not a postconviction court, should decide whether a defendant is believable. *Lore, supra*. See also, *Kyles v. Whitley*, 514 U.S. 419, 449, n.19 (1995) (state postconviction's judge's finding that a witness is not convincing does not defeat a claim of prejudice, since that observation could not substitute for the jury's appraisal at trial). Credibility of a witness is for the jury, not the postconviction court. *Antwine v. Delo*, 54 F.3d 1357, 1365(8thCir.1995).

Additionally, counsel Green thought that Mr. Williams was very credible (H.Tr.114). Counsel knew that a client's testimony could make the difference between life and death. He had clients testify in death cases and receive life, even when they denied responsibility for the crime(H.Tr.116-18). He also had a jury find a client not guilty where that client admitted some prior crimes and denied others(H.Tr.111).

Co-counsel McGraugh knew that putting a human face on a client was important(H.Tr.66-67). Mr. Williams' admission of other crimes could have been seen by the jury in a positive light(H.Tr.74). They might conclude that he was taking responsibility for the things he had done, since he admitted crimes that had not been charged(H.Tr.74-75). In the end, McGraugh believed it was for the jury to decide what was believable(H.Tr.74).

Mr. Williams was denied his right to speak for himself at the penalty phase of his trial. Counsel were ineffective for not informing him of this right. A new penalty phase should result.

### **XIII. Mr. Williams' Right to Reject Appointed Counsel Under Rule 29.16**

**The motion court erred in denying Mr. Williams' motions to reject the appointment of counsel and his Rule 75.01 motion for reconsideration, thereby denying him due process, meaningful access to the courts, self-representation, and conflict-free counsel, U.S.Const.,Amends. VI and XIV, Mo.Const.,Art. I, §§ 10 and 18(a), and his rights under Rule 29.16, in that the court failed to determine whether Mr. Williams was competent to reject the appointment of counsel and whether he did so understanding its legal consequences, as required by Rule 29.16(a). The record shows he is competent and understands the legal consequences, and should have been allowed to reject appointed counsel.**

Rule 29.16(a) allows a movant in a death penalty case to reject appointed counsel if he is competent and understands the legal consequences of rejecting appointed counsel. Mr. Williams tried to reject appointed counsel, pursuant to Rule 29.16. On September 22, 2003, he filed a *pro se* motion to reject the appointment of counsel under Rule 29.16(a)(L.F.356-57). A month later, Mr. Williams filed a second motion, again asking to reject appointed counsel pursuant to Rule 29.16(a)(L.F.362-63). The same day, the motion court ordered appointed counsel to file a response to Mr. Williams' motion to reject them(L.F.366). Counsel filed a response(L.F.399-400). After waiting for the court to rule, Mr. Williams again filed a motion, complaining that the court had not ruled on his

request to reject appointed counsel(L.F.757-73). He correctly stated that Rule 29.16(a) does not provide that appointed counsel respond to motions to reject appointed counsel(L.F.758). Rather, the rule directs the motion court to find on the record, after a hearing if necessary, whether he is competent to accept or reject the appointment, understanding the legal consequences(L.F.758).

Mr. Williams advised the court that appointed counsel had not included in the amended motion all claims known to him, including:

- a) the prosecutor knowingly presented false and misleading evidence at trial in violation of the due process clause of the 14<sup>th</sup> Amendment of the U.S. Constitution. The prosecutor knew or should have known that police officers searched Mr. William's 1984 Buick LaSabre parked at his grandfather's house and watched as Mr. Williams' cousin, Joseph Hill knocked the lock out of the trunk. The officers then seized a letter addressed to state witness, Laura Asaro. This search showed that Asaro falsely testified that Mr. Williams' uncles gave her access to the trunk and she needed to use a screwdriver to gain access to the trunk. The search also showed that the prosecutor misled the jury in cross-examining defense witness Latonya Hill, suggesting that the lock was rusted out and had not been knocked out during the search;
- b) Counsel were ineffective in failing to object and rebut this false information as they had the police report of the search and should have

called Mr. Hill and the two officers who saw Mr. Hill knock out the lock and then subsequently searched the vehicle;

c) Counsel were ineffective in failing to establish the circumstances of the search during the redirect examination of the defense witness, Latonya Hill;

d) Counsel were ineffective in failing to present evidence that Mr. Williams' car was not operational during the month of August, 1998, including the date of the alleged offense, which would have established that state witness Asaro testified falsely when she claimed that Mr. Williams drove to her mother's on the day of the offense;

e) Counsel were ineffective in failing to call Officer Mark Biondolino to testify to the contents of his report, showing that Quentin Davis attacked Officer Schiller with a metal pipe, refuting Schiller's trial testimony that Mr. Williams tried to hit him with the iron bar;

f) Counsel were ineffective in failing to investigate the crime scene and to present evidence refuting Asaro's claim that Mr. Williams laid down next to the victims body, and State witness, Henry Cole's claim that Mr. Williams moved the victim's body;

g) Counsel were ineffective in failing to investigate and present evidence that Eric Payne and James Hearn committed the charged offense, provable through witnesses Eric Payne, Freddie Payne, Eleasah Cushuan

Brown, Eric House, Wilma Chestnut House, Diana Brown, and Imogene (aka Jean) Harris;

h) Appellate counsel was ineffective in failing to raise trial counsels' conflict of interest and the trial court's failure to conduct a hearing regarding the conflict.

(L.F.759-72).

Mr. Williams should be allowed to pursue these claims. "It has long been established that the prosecution's 'deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice.'" *Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256, 1274(2004), quoting *Giglio v. United States*, 405 U.S. 150, 153(1972). The state may not stand silently and do nothing to correct its witness' false testimony. *Napue v. Illinois*, 360 U.S. 264,269-70(1959).

Additionally, Mr. Williams had the right to effective assistance of counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution. *Strickland v. Washington*, 466 U.S. 668(1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000); *State v. Butler*, 951 S.W.2d 600, 608(Mo.banc1997). Counsel is ineffective when they fail to investigate and present exculpatory evidence. *Moore v. State*, 827 S.W.2d 213, 215-16(Mo.banc1992) (counsel's failure to request blood tests of readily available evidence that would have shown that Moore could not be the source of semen found on the victim's sheet was ineffective); *Wolfe v. State*, 96 S.W.3d 90, 93-95(Mo.banc2003) (counsel's failure to investigate and test

physical evidence, a hair, that would have connected the accomplice Cox, not Wolfe, to the crime scene, was ineffective).

Particularly troubling is counsel's failure to investigate other suspects who may have committed the crime. Counsel must investigate others who may have committed the crime. *Butler*, 951 S.W.2d at 606-10; *Henderson v. Sargent*, 926 F.2d 706,(8<sup>th</sup> Cir.), *amended*, 926 F.2d 706(1991). "There is no reasonable trial strategy that would lead competent counsel to decline investigation into documented allegations that there may have been an alternate perpetrator." *Giaimo v. State*, 41 S.W.3d. 49, 54(Mo.App.E.D.2001).

Yet the motion court summarily denied all Mr. Williams' motions to reject counsel, making no findings about Mr. Williams' competency or understanding of the legal process(L.F.774). Mr. Williams again asked the court to reconsider (L.F.946-62), but the court refused(L.F.963).

The court's rulings violated Rule 29.16(a)'s plain terms. This Court should reverse and remand with instructions that Mr. Williams be allowed to reject appointed counsel, or alternatively, remand for findings on Mr. Williams' competency to reject counsel and his understanding of those consequences.

### **Standard of Review**

Due process requires a fair hearing in 29.15 proceedings. *Thomas v. State*, 808 S.W.2d 364, 367(Mo.banc1991); *In re Murchison*, 349 U.S. 133, 136(1955).

Due process is implicated when the motion court fails to allow a litigant to reject appointed counsel. The right to represent oneself is fundamental for both criminal



and civil litigation. *Bittick v. State*, 105 S.W.3d 498, 503-04(Mo.App.W.D.2003), citing *Faretta v. California*, 422 U.S. 806, 824(1975). Denying a movant's right to represent himself and proceed *pro se* denies him meaningful access to the courts. *Bittick, supra* at 504, n. 4.

This Court has codified the right to reject counsel. Rule 29.16(a)<sup>20</sup> provides:

If movant seeks to reject the appointment of counsel, the court *shall* find on the record, after a hearing if necessary, whether the movant is able to competently decide whether to accept or reject the appointment and whether the movant rejected the offer with the understanding of its legal consequences.

(emphasis added).

#### **Right to Reject Appointed Counsel**

By ignoring Rule 29.16(a)'s plain, mandatory language, the motion court erred. It made no finding whether Mr. Williams could competently decide whether to accept the appointment or whether Mr. Williams rejected the offer, understanding its legal consequences(L.F. 774). The rule's mandatory language

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<sup>20</sup> Rule 29.16(a) tracks 28 U.S.C.,§2261. The procedures in Chapter 154 of the Anti-Terrorism and Effective Death Penalty Act are applicable only if the State has established a mechanism for appointment of counsel, including the right to reject the appointment of counsel.

creates an expectation protected by the Due Process Clause, *Ford v. Wainwright*, 477 U.S. 399, 428(1986) (O'Connor, J., concurring and dissenting) that cannot be arbitrarily abrogated. *Wolff v. McDonnell*, 418 U.S. 539,557-58 (1974).

The motion court erred in failing to comply with Rule 29.16(a). The court should have found Mr. Williams competent to reject counsel and that he did so understanding the legal consequences. As in *Bittick*, this Court should reverse the motion court's denial of Mr. Williams' right to represent himself and remand for further proceedings, in which Mr. Williams is afforded the opportunity to present evidence to support his claims.

## **CONCLUSION**

Based on the arguments in Points I-XI, Mr. Williams requests this Court reverse and remand for an evidentiary hearing; Point XII, a new penalty phase; Point XIII, a remand for further proceedings consistent with Rule 29.16.

Respectfully submitted,

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### **Certificate of Compliance and Service**

I, Melinda K. Pendergraph, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 31,000 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in December, 2004. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 23rd day of December, 2004, Office of the Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, Missouri 65102.

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Melinda K. Pendergraph